

# THE ARMY LAWYER

Headquarters, Department of the Army

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### Editor

Captain Benjamin T. Kash

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# The Civil Rights Act of 1991

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## Introduction

On November 21, 1991, President George Bush signed the Civil Rights Act of 1991.<sup>1</sup> This new legislation was designed to strengthen the barriers and sanctions against employment discrimination<sup>2</sup> and to respond to the recent Supreme Court decision in *Wards Cove Packing Co. v. Atonio*.<sup>3</sup> It significantly altered two federal discrimination statutes—the Civil Rights Act of 1964 (Title VII) and the Rehabilitation Act of 1973.<sup>4</sup> Noticeably absent from the new legislation, however, was any substantive change to the Age Discrimination in Employment Act (ADEA).<sup>5</sup>

Most important from a federal defensive litigation perspective, the new legislation altered the law of disparate impact. It provides for additional remedies and—in some circumstances—a jury trial in suits against the United States, increases the statutory time limit for filing suit, and alters the “mixed motive” defense. Army attorneys can expect litigation to increase as the courts struggle to determine the legislation’s limitations and its applicability to the federal government.<sup>6</sup> Furthermore, the Act increases the financial incentive for plaintiff’s

attorneys to take discrimination cases<sup>7</sup> and reduces the incentive for settlement,<sup>8</sup> which will lead to further delays in bringing cases to trial.<sup>9</sup>

This article does not address all the provisions of the Civil Rights Act of 1991. Instead, it focuses on only those provisions that impact directly on discrimination complaints against the Army. The author will highlight the salient provisions of the new legislation and will attempt to clarify its parameters.

## Damages

Before the enactment of the Civil Rights Act of 1991, federal employees could not recover compensatory or punitive damages in a Title VII<sup>10</sup> or handicap discrimination suit.<sup>11</sup> In the 1991 Act, Congress maintained the prohibition against punitive damages,<sup>12</sup> but cracked the door ajar to recovery of compensatory damages.

Federal employees suing under Title VII<sup>13</sup> or the Rehabilitation Act of 1973<sup>14</sup> now may recover up to \$300,000<sup>15</sup> in compensatory damages for “future pecuni-

<sup>1</sup> Pub. L. 102-166, 105 Stat. 1071. The Senate passed the new legislation on October 30, and the House passed the Senate bill on November 7. 137 Cong. Rec. S15,503 (daily ed. Oct. 30, 1991); *id.* at H9557 (daily ed. Nov. 7, 1991).

<sup>2</sup> George H.W. Bush, Statement by the President (Nov. 21, 1991).

<sup>3</sup> 490 U.S. 642 (1989); see Civil Rights Act of 1991 § 3, 105 Stat. at 1071.

<sup>4</sup> 42 U.S.C. §§ 2000e to 2000e-17 (1988); 29 U.S.C. §§ 791, 794a.

<sup>5</sup> 29 U.S.C. §§ 621-634 (1988). The 1991 Civil Rights Act’s only change to the ADEA requires the Equal Employment Opportunity Commission to notify a complainant when a charge is dismissed or otherwise terminated. The complainant then may bring suit within 90 days of receiving this notice. 1991 Civil Rights Act § 115, 105 Stat. at 1079.

<sup>6</sup> See Ingwersen, *New Civil Rights Law Bears Seeds of Controversy*, The Christian Science Monitor, Nov. 21, 1991, at 1, col. 4 (“Politicians left a lot of room for argument in the 1991 civil rights bill”); cf. Crovitz, *Bush’s Quota Bill’s (Dubious) Politics Trumps Legal Principle*, Wall St. J., Oct. 30, 1991 (“ensures years of costly lawsuits as judges try to fathom what Congress meant by a bill that intentionally doesn’t say what it means”) reprinted in 137 Cong. Rec. S15,492 (daily ed. Oct. 30, 1991).

<sup>7</sup> Cf. *Increase Predicted in Maryland Harassment Cases*, Wash. Post, Nov. 29, 1991, at C7, col. 5 (“Private attorneys should be more willing to take these cases’ because of the monetary damages available”).

<sup>8</sup> “[H]uge monetary award amounts are encouraged through jury trials, eliminating any incentive for the plaintiff and defendant to settle early. And with legal and expert fees allowed, there is no incentive for the lawyer to settle either.” 137 Cong. Rec. S15,468 (daily ed. Oct. 30, 1991) (statement of Sen. Symms).

<sup>9</sup> *Id.* at S15,463 (statement of Sen. Kassebaum) (“additional damages and jury trials will lead to further delays ... it may take five years or longer to complete a jury trial under this bill”); cf. *id.* at S15,483 (statement of Sen. Simpson) (expressing concern that trial attorneys will prolong litigation needlessly to increase fees).

<sup>10</sup> *Grace v. Rumsfeld*, 614 F.2d 796 (1st Cir. 1990); *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977); *Smith v. Office of Personnel Management*, 778 F.2d 258 (5th Cir. 1985); *Boddy v. Dean*, 821 F.2d 346 (6th Cir. 1987); *Espinueva v. Garrett*, 895 F.2d 1164, 1165 (7th Cir. 1990); *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982); *Bruni v. United States*, 56 Fair Empl. Prac. Cas. (BNA) 601 (D. Mass. 1991).

<sup>11</sup> *Mack A. Player, Employment Discrimination Law* § 7.16, at 609 (1988). Federal employees are limited to remedies authorized by section 717 of Title VII. *Id.* at 608; cf. *Eastman v. V.P.I.*, 56 Fair Empl. Prac. Cas. (BNA) 717 (4th Cir. 1991); *Turner v. First Hosp. Corp. of Norfolk*, 772 F. Supp. 284 (E.D. Va. 1991); *Americans Disabled for Accessible Pub. Transp. (ADAPT), Salt Lake Chapter v. Skywest Airlines, Inc.*, 762 F. Supp. 320 (D. Utah 1991); *Jenkins v. Skinner*, 56 Fair Empl. Prac. Cas. (BNA) 1125 (E.D. Va. 1991).

<sup>12</sup> A party may not recover punitive damages against “a government, government agency, or political subdivision.” Civil Rights Act of 1991 § 102, 105 Stat. 1073 (to be codified at 42 U.S.C. § 1981a(b)(1)).

<sup>13</sup> *Id.*, 105 Stat. 1072 (to be codified at 42 U.S.C. § 1981a(a)(1)).

<sup>14</sup> *Id.* (to be codified at 42 U.S.C. § 1981a(a)(2)).

<sup>15</sup> *Id.*, 105 Stat. at 1073 (to be codified at 42 U.S.C. § 1981a(b)(3)(D)). The jury shall not be informed of the damages limitation. *Id.* (to be codified at 42 U.S.C. § 1981a(c)(2)).

ary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other pecuniary damages."<sup>16</sup> In addition to this recovery, a plaintiff may seek other remedial relief, such as back pay, interest on back pay, or other relief authorized under Title VII;<sup>17</sup> however, the court may reduce the plaintiff's final award if the court deems it to be excessive.<sup>18</sup> The damages limitation applies to each complaining party when multiple plaintiffs have filed suit in a single case.<sup>19</sup> The new legislation specifically prohibits awards of compensatory damages in disparate impact cases<sup>20</sup> and in Rehabilitation Act cases in which the defendants have made a good-faith effort reasonably to accommodate a handicapped employee.<sup>21</sup>

### Jury Trial

Plaintiffs formerly had no right to a jury trial in a suit brought under Title VII<sup>22</sup> or the Rehabilitation Act.<sup>23</sup> A plaintiff now may demand a trial by jury, however, if he or she seeks compensatory damages.<sup>24</sup> Because the 1991 Civil Rights Act links a plaintiff's right to a jury trial to the recovery of compensatory damages, jury trials are unavailable in disparate impact trials.

The Act is unclear whether the jury may decide all issues or may rule upon only the issue of damages. Because the right to a jury trial is predicated upon the

right to compensatory damages, the jury's function arguably should be limited to deciding the amount—if any—of damages due the plaintiff.

Cases in which issues of liability and damages are tried and determined separately commonly are referred to as "bifurcated" trials.<sup>25</sup> A growing number of jurisdictions permit the issue of liability on the merits to be tried separately from the issue of damages.<sup>26</sup> In the federal sector, Federal Rule of Civil Procedure 42(b) expressly permits bifurcated trials;<sup>27</sup> federal courts, therefore, may bifurcate cases that arise under civil rights causes of action.<sup>28</sup> The rule also permits separation of jury and nonjury issues<sup>29</sup> and separate trials on the issue of a defendant's liability in damages.<sup>30</sup> The decision to separate the issues of liability and damages is within the sound discretion of the trial judge and, absent a showing of prejudice, the judge's decision will not be reversed on appeal.<sup>31</sup> Because an order granting or denying separate trials normally is nonappealable and interlocutory, it may be reviewed only upon entry of a final order or judgment.<sup>32</sup>

Bifurcated trials offer a number of advantages in discrimination cases. Separating the issues of liability and damages avoids prejudice to the defendant by postponing the jury's consideration of evidence of injuries—which often is relevant only to the issue of damages—until liability has been found.<sup>33</sup> Moreover, bifurcation promotes

<sup>16</sup>Id. (to be codified at 42 U.S.C. § 1981a(b)(3)).

<sup>17</sup>Id. (to be codified at 42 U.S.C. § 1981a(b)(2)).

<sup>18</sup>137 Cong. Rec. S15,484 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth); cf. 22 Am. Jur. 2d *Damages* § 1022, at 1070 n.89 (1988) (federal appellate courts normally will not disturb a civil jury award unless it is "grossly excessive or shocking to conscience") (citing *La Forest v. Autoridad de Las Fuentes Fluviales*, 536 F.2d 443 (1st Cir. 1976)). See generally 22 Am. Jur. 2d *Damages* §§ 1017-1027 (1988).

<sup>19</sup>1991 Civil Rights Act § 102, 105 Stat. at 1073 (to be codified at 42 U.S.C. § 1981a(b)(3)) (setting precise limits on recovery of "compensation ... and punitive damages ... for each complaining party") (emphasis added); see also 137 Cong. Rec. S15,471 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy).

<sup>20</sup>1991 Civil Rights Act § 102, 105 Stat. 1072 (to be codified at 42 U.S.C. § 1981a(a)(1), (2) (denying recovery for any "employment practice that is unlawful because of its disparate impact").

<sup>21</sup>Id. (to be codified at 42 U.S.C. § 1981a(a)(3)); see also 137 Cong. Rec. S15,467 (daily ed. Oct. 30, 1991) (statement of Sen. Dodd); *id.* at S15,485 (statement of Sen. Kennedy).

<sup>22</sup>*Lehman v. Nakshian*, 453 U.S. 156, 164, 168-69 (1981) ("there is no right to trial by jury in cases arising under Title VII"); *Wilson v. City of Aliceville*, 779 F.2d 631 (11th Cir. 1986); *Trotter v. Todd*, 719 F.2d 346 (10th Cir. 1983); *Harmon v. May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978) (no right to jury trial in Title VII suit); *Giles v. Equal Employment Opportunity Comm'n*, 520 F. Supp. 1198, 1200 (E.D. Mo. 1981) ("jury trials are not a matter of right in a Title VII cause of action").

<sup>23</sup>*Smith v. Barton*, 914 F.2d 1330 (9th Cir. 1990); *Ahonen v. Frank*, 56 Fair Empl. Prac. Cas. (BNA) 1296 (E.D. Wisc. 1991); *Jenkins v. Skinner*, 56 Fair Empl. Prac. Cas. (BNA) 1125 (E.D. Va. 1991); *Giles v. Equal Employment Opportunity Comm'n*, 520 F. Supp. 1198, 1200 (E.D. Mo. 1981). Moreover, plaintiffs have no right to a jury trial in age discrimination suits. *Lehman v. Nakshian*, 453 U.S. 156, 168-69 (1981); *Attwell v. Granger*, 748 F. Supp. 866 (N.D. Ga. 1990); *Grandison v. United States Postal Serv.*, 54 Fair Empl. Prac. Cas. (BNA) 1323 (S.D.N.Y. 1988); *Giles*, 520 F. Supp. at 1200.

<sup>24</sup>1991 Civil Rights Act § 102, 105 Stat. at 1073 (to be codified at 42 U.S.C. § 1981a(c)); see also 137 Cong. Rec. S15,460 (daily ed. Oct. 30, 1991) (statement of Sen. Mikulski) ("possible for a jury to award compensatory damages to Federal employees").

<sup>25</sup>74 Am. Jur. 2d *Trial* § 140, at 351 (1991).

<sup>26</sup>Id. (citations omitted).

<sup>27</sup>Id. at 352-53.

<sup>28</sup>Id. at § 142, at 354 (citing *Barnell v. Paine Webber Jackson & Curtis, Inc.*, 577 F. Supp. 976 (S.D.N.Y. 1983); *Equal Employment Opportunity Comm'n v. Lucky Stores*, 37 Fed. R. Serv. 2d 333 (E.D. Cal. 1982)). See generally Eunice A. Eichelberg, Annotation, *Propriety of Ordering Separate Trials as to Liability and Damages, Under Rule 42(b) of Federal Rules of Civil Procedure, in Civil Rights Actions*, 79 A.L.R. Fed. 220 (1986).

<sup>29</sup>James W. Moore et al., *Moore's Federal Practice* ¶ 42.03(1), at 42-46 (2d ed. 1988) (citations omitted).

<sup>30</sup>Id. at 42-59 (citations omitted).

<sup>31</sup>75 Am. Jur. 2d *Trial* § 140, at 351 (1991); 5 Moore et al., *supra* note 29, ¶ 42.03(3), at 42-68 ("will not be upset except for an abuse of discretion") (citations omitted). In the Third Circuit, however, a decision to bifurcate may be subject to reversal without a showing of prejudice if the trial judge fails to demonstrate on the record the exercise of an informed decision on the matter. See 75 Am. Jur. 2d *Trial* § 141, at 353 (1991).

<sup>32</sup>5 Moore et al., *supra* note 29, ¶ 42.03(3), at 42-68.

<sup>33</sup>75 Am. Jur. 2d *Trial* § 141, at 353 (1991).

judicial economy and a speedier resolution of the case. If no liability is found, no evidence must be presented on the issue of damages.<sup>34</sup> When a trial judge would determine the issue of liability, to bifurcate the trial would permit the court to avoid the burden of impaneling a jury when no need for one exists. Indeed, some federal courts already have ordered separate trials on the issues of liability and damages with a view toward holding settlement conferences after making findings of liability, but before the issues of damages are tried.<sup>35</sup>

### Prejudgment Interest

Before Congress enacted the Civil Rights Act of 1991, the vast majority of courts held that prejudgment interest was not available against the United States under Title VII.<sup>36</sup> The few courts to hold otherwise did so only after finding a limited waiver of sovereign immunity for prejudgment interest in the 1987 amendments to the Back Pay Act.<sup>37</sup> Even under this limited waiver theory, a court could not award prejudgment interest in employment actions involving the discriminatory failure to hire<sup>38</sup> or to promote because these actions do not involve the "withdrawal or reduction" of compensation.<sup>39</sup>

Whether through inadvertence or political compromise, the language of the Act failed to alter existing law materially in this area. Although it specifically waives sovereign immunity for *postjudgment* interest,<sup>40</sup> the Act

contains no express waiver for prejudgment interest and no such waiver can be gleaned from its legislative history. Assuming *arguendo* that the legislation's drafters actually intended to permit this relief,<sup>41</sup> prejudgment interest nevertheless cannot be recovered in a suit against the United States, absent an express waiver of federal sovereign immunity.<sup>42</sup>

### Expert Fees

Overtuning *West Virginia University Hospital v. Casey*,<sup>43</sup> the new legislation specifically amended Title VII to include expert fees in the award of attorney fees.<sup>44</sup> A prevailing party now may recover "expert fees" as part of his or her "reasonable attorney fees."<sup>45</sup> Unfortunately, the Act poorly defines the parameters of the expert fee award. The drafters apparently intended this provision to permit the prevailing party to recover a "reasonable" fee only for an expert witness.<sup>46</sup> A party therefore should not recover fees for experts that assist in the preparation of the case, but do not testify. The provision, however, permits a prevailing party to recover for all pretrial work performed by an expert witness.<sup>47</sup>

This provision also limits the prevailing party's recovery to "reasonable" expert fees.<sup>48</sup> The expert fee award should not "exceed the amount actually paid to the expert, or the going rate for such work, whichever is lower."<sup>49</sup> Because the expert fee award is part of plain-

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Library of Congress v. Shaw*, 478 U.S. 310 (1986); *Cross v. United States Postal Serv.*, 733 F.2d 1327 (8th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *Blake v. Califano*, 626 F.2d 891 (D.C. Cir. 1980); *Saunders v. Claytor*, 629 F.2d 596 (9th Cir. 1980); *De Weever v. United States*, 618 F.2d 685 (10th Cir. 1980); *Fischer v. Adams*, 572 F.2d 406 (1st Cir. 1978); *Richerson v. Jones*, 551 F.2d 918 (3rd Cir. 1977).

<sup>37</sup> 5 U.S.C. § 5596 (1988); *see also Brown v. Secretary of the Army*, 918 F.2d 214 (D.C. Cir. 1990); *Smith v. Brady*, 774 F. Supp. 925 (N.D. Cal. 1990); *Lee v. Brady*, 741 F. Supp. 990 (D.D.C. 1990); *Hearn v. Turnage*, 739 F. Supp. 1312 (E.D. Wisc. 1990).

<sup>38</sup> *Wrenn v. Secretary, Dep't of Veterans' Affairs*, 918 F.2d 1073, 1077 (2d Cir. 1990), *cert. denied* 111 S. Ct. 1625 (1991) (Back Pay Act's provisions "apply only to agency employees, not to job applicants").

<sup>39</sup> *Brown*, 918 F.2d at 218 (failure to promote involved no "withdrawal or reduction of all or part of [the plaintiff's] compensation"); *Lee*, 741 F. Supp. at 991 ("failure to promote [is] ... a 'personnel action' not covered by the Back Pay Act."); *Mitchell v. Secretary of Commerce*, 715 F. Supp. 409, 411 (D.D.C. 1989); *see also Hearn*, 739 F. Supp. at 1313 (Back Pay Act permits a claim for prejudgment interest "only when the agency withdrew or reduced an employee's pay, not when the agency denies a promotion").

<sup>40</sup> Section 114 of the Act amends 42 U.S.C. § 2000e-16(d) to make the United States liable for "the same interest to compensate for delay in payment ... as in cases involving nonpublic parties." Civil Rights Act of 1991 § 114, 105 Stat. at 1079; *see* 137 Cong. Rec. S15,477 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond) (this provision "authorizes the payment of interest to compensate for delay in the payment of a judgment"). Absent a waiver of sovereign immunity, postjudgment interest is not recoverable against the United States. *Thompson v. Kennickell*, 41 Fair Empl. Prac. Cas. (BNA) 1435, 1436-37 (D.C. Cir. 1986); *Miles v. Bolger*, 546 F. Supp. 375, 377 (E.D. Cal. 1982).

<sup>41</sup> *But see Mitchell*, 715 F. Supp. at 411 n.5 ("[n]or can an intent on the part of the framers of a statute ... to permit the recovery of interest suffice where the intent is not transformed into affirmative statutory or contractual terms") (citing *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 659 (1947)).

<sup>42</sup> *Shaw*, 478 U.S. at 311.

<sup>43</sup> 111 S. Ct. 1138 (1991). In *Casey*, the Supreme Court held that expert witness fees could not be shifted to the losing party as part of an award of attorney fees pursuant to 42 U.S.C. § 1988. *See id.* at 1139, 1148.

<sup>44</sup> *See* Civil Rights Act of 1991 § 113(b), 105 Stat. at 1079.

<sup>45</sup> *See id.* (amending 42 U.S.C. § 2000e-5(k)).

<sup>46</sup> 137 Cong. Rec. S15,477 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond); *see also* George H.W. Bush, Statement by the President (Nov. 21, 1991) ("expert witness fees"); 137 Cong. Rec. S15,235 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy) ("expert witness costs"); *id.* at H9539 (daily ed. Nov. 7, 1991) (statement of Rep. Clay) ("expert witness fees").

<sup>47</sup> 137 Cong. Rec. S15,477 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond) ("provision is intended to allow recovery for work done in preparation for trial as well as after the trial has begun").

<sup>48</sup> *Id.* ("[i]n exercising its discretion, the court should ensure that fees are kept within reasonable bounds").

<sup>49</sup> *Id.*

tiff's reasonable attorney fees, case law defining attorney fee awards should apply equally well to the costs of experts.

### Disparate Impact

The new legislation dramatically changed the employer's burden of proof in disparate impact cases.<sup>50</sup> Under *Wards Cove Packing Co. v. Atonio*,<sup>51</sup> the plaintiff initially had to identify a specific employment practice that resulted in a disparate impact on a protected Title VII class.<sup>52</sup> Only then did the defendant assume the burden of producing evidence of a "business justification" for the challenged practice.<sup>53</sup> If the employer successfully presented a business necessity defense, the plaintiff still could prevail by persuading the trier of fact that "other tests or selection devices, without a similarly undesirable racial effect," were available and that the employer had used the challenged device as a pretext for discrimination.<sup>54</sup> Regardless of the legal theory, however, in a disparate impact case the plaintiff always retained the ultimate burden of persuasion.<sup>55</sup>

The Act does not change the plaintiff's specificity and causation requirements;<sup>56</sup> however, it shifts a portion of the burden of proof to the defendant, requiring him or her to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."<sup>57</sup> Significantly, the Act's drafters intentionally failed to define the terms "job related" or "business necessity" as they strove to attain political compromise.<sup>58</sup>

An exception to the specificity requirement now exists when a plaintiff demonstrates to the court that the elements of an employer's "decisionmaking process are not capable of separation for analysis." The entire process then may be analyzed as a single employment practice.<sup>59</sup> This exception does not apply if the process of separation is merely difficult or expensive.<sup>60</sup>

A plaintiff also may establish liability under a disparate impact theory by proving the availability of a less discriminatory alternative employment practice that the defendant has refused to adopt.<sup>61</sup> The alternative practice should be comparable in cost and equally effective in

<sup>50</sup>For a developmental discussion of the law of disparate impact, see generally Dean C. Berry, *The Changing Face Of Disparate Impact*, 125 Mil. L. Rev. 1 (1989).

<sup>51</sup>109 S. Ct. 2115 (1989); see also *Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

<sup>52</sup>*Wards Cove Packing Co.*, 109 S. Ct. at 2124-25.

<sup>53</sup>*Id.* at 2126.

<sup>54</sup>*Id.* at 2126 (citing *Watson v. Fort Worth Nat'l Bank*, 108 S. Ct. 2777, 2781 (1988); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)); see also *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). The Supreme Court first announced the alternative employment practice analysis in *Albemarle Paper Co.* See Berry, *supra* note 50, at 13.

<sup>55</sup>*Wards Cove Packing Co.*, 109 S. Ct. at 2126; see also *Watson*, 108 S. Ct. at 2790 (plurality opinion). But see *Watson*, 108 S. Ct. at 2792 (Blackmun, J., concurring). After the Court's decisions in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in *Albemarle Paper*, the employer actually assumed the burden of proof once plaintiff established a prima facie case. See Berry, *supra* note 50, at 13, 44-45 (citing *Albemarle Paper Co.*, 422 U.S. at 425). Not until *Watson* did the Court first indicate that the employer acquired only the burden of persuasion, with plaintiff always retaining the ultimate burden of proof. *Id.* at 44 (citing *Watson*, 108 S. Ct. at 2790).

<sup>56</sup>Civil Rights Act of 1991 § 105(a), 105 Stat. at 1074 (adding subsection (k)(1)(A)(i) to 42 U.S.C. § 2000e-2 (1988)); see also 137 Cong. Rec. S15,237 (daily ed. Oct. 25, 1991) (statement of Sen. Hatch) (the requirement that the plaintiff "identify the particular business practice causing the disparity in a disparate impact case has been preserved"); *id.* at S15,474 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond) (the new legislation "always requires the complaining party to demonstrate 'that the respondent uses a particular employment practice that causes disparate impact'"); *id.* at S15,484 (statement of Sen. Danforth).

<sup>57</sup>Civil Rights Act of 1991 § 105(a), 105 Stat. at 1074 (adding subsection (k)(1)(A)(i) to 42 U.S.C. § 2000e-2 (1988)); see 137 Cong. Rec. S15,498 (daily ed. Oct. 30, 1991) (statement of Sen. Hatch) ("the employer must come forward and meet the burden not only of production ... but the burden of persuasion as well").

<sup>58</sup>See Ingwersen, *supra* note 6, at 2, col. 2 ("to win passage, the bill had to blur a key point by avoiding a clear definition of how business can justify job requirements that end up discriminating by race or sex"); 137 Cong. Rec. S15,241 (daily ed. Oct. 25, 1991) (statement of Sen. Gorton) (the Act "does not attempt to further define the terms 'job related' or 'business necessity'"); *id.* at S15,463 (daily ed. Oct. 30, 1991) (statement of Sen. Kassebaum) ("the definition of business necessity is now left undefined"); *id.* at S15,486 (statement of Sen. Kohl) ("business necessity" is not defined ... [but the Act] does reference business necessity concepts as they are discussed in *Griggs*"); cf. Gray, *Civil Rights: We Won, They Capitulated*, Wash. Post., Nov. 14, 1991, at A3, col. 2, 3 ("On the contentious issue of 'business necessity,' which defines the standard that employers must meet in justifying statistical disparities, the proposal used essentially meaningless language from the Americans with Disabilities Act [of 1990, Pub. L. No. 101-336, 104 Stat. 327] that left the term in question undefined").

<sup>59</sup>Civil Rights Act of 1991 § 105(a), 105 Stat. 1074 (adding subsection (k)(1)(B)(i) to 42 U.S.C. § 2000e-2); see also 137 Cong. Rec. S15,484 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth).

<sup>60</sup>137 Cong. Rec. S15,474 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond). The exception does not apply when an employer fails to maintain pertinent personnel records. *Id.* Moreover, the expense of utilizing multiple regression analysis to separate the elements of the decision making process does not trigger the specificity exception. *Id.*; cf. Berry, *supra* note 50, at 44 (multiple regression analysis is equally available to both parties). Senator Danforth opined that this exception would apply when an employer's decisionmakers cannot reconstruct the basis of the employment decision because they possessed unfettered discretion in the decision making process. 137 Cong. Rec. S15,484 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth) (citing *Sledge v. J.P. Stevens & Co.*, 52 Empl. Prac. Dec. (CCH) ¶ 39,537 (E.D.N.C. Nov. 30, 1991)).

<sup>61</sup>Civil Rights Act of 1991 § 105(a), 105 Stat. 1074 (adding subsection (k)(1)(A) to 42 U.S.C. § 2000e-2 (1988)); see also Note, *Civil Rights Act of 1991*, Lab. Rel. Rep. (BNA) Supp. to No. 11, at S-1 (Nov. 11, 1991); 137 Cong. Rec. S15,473 (daily ed. Oct. 30, 1991).

achieving the employer's legitimate business goals.<sup>62</sup> The Act specifically mandates that only law existing on June 4, 1989—the day before the Supreme Court decided *Wards Cove Packing Co.*—may be applied in alternative employment practice cases.<sup>63</sup>

The Act limits the legislative history that the courts may apply to interpret “any provision of this Act that relates to *Wards Cove*—Business necessity/cumulation/alternative business practice” to the interpretative memorandum appearing in the October 25, 1991, *Congressional Record*.<sup>64</sup> That statement provides:

The terms “business necessity” and “job related” are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.<sup>65</sup>

Because the Supreme Court never has provided lower courts with a precise definition of “business necessity,”<sup>66</sup> this issue remains a fertile ground for advocacy. In *Griggs v. Duke Power Co.*,<sup>67</sup> the Court merely sug-

gested that the defendant's employment device should have a “manifest relationship to the employment in question.”<sup>68</sup> Later, in *Albemarle Paper Co. v. Moody*,<sup>69</sup> the Court expounded on its view of business necessity, requiring a close nexus between the challenged employment device and actual job performance,<sup>70</sup> and holding that even a validated employment test could be found to be a pretext for discrimination.<sup>71</sup>

In *Dothard v. Rawlinson*,<sup>72</sup> the Court rejected the Alabama Board of Correction's minimum height and weight requirements for its prison guards. It held that these requirements had a disparate impact on women, noting that the defendant had failed to correlate a job applicant's size with the requisite amount of physical strength essential for effective job performance.<sup>73</sup> The Court opined that the defendant's job requirements could not be considered legitimate if alternative tests were available that would serve the defendant's business purposes equally well without producing a discriminatory impact on a protected class.<sup>74</sup>

Although the concept of business necessity is flexible<sup>75</sup> and only partially defined, the “business necessity” standard appears to contain three requirements: (1) a substantial employer interest; (2) a factually supported, close or manifest relationship between the challenged employment practice and the employer's interest; and (3) the absence of any alternative practice that would serve the employer equally well without a concomitant discriminatory effect.<sup>76</sup>

<sup>62</sup>137 Cong. Rec. S15,476 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond) (citing *Watson v. Fort Worth Nat'l Bank*, 108 S. Ct. 2777, 2790 (1988)).

<sup>63</sup>Civil Rights Act of 1991 § 105(a), 105 Stat. at 1074 (adding subsection (k)(1)(C) to 42 U.S.C. § 2000e-2 (1988)).

<sup>64</sup>*Id.* § 105(b), 105 Stat. at 1075.

<sup>65</sup>137 Cong. Rec. S15,276 (daily ed. Oct. 25, 1991).

<sup>66</sup>Player, *supra* note 11, § 5.41(c), at 367.

<sup>67</sup>401 U.S. 424 (1970).

<sup>68</sup>*Id.* at 432; *see also* Player, *supra* note 11, at 367.

<sup>69</sup>422 U.S. 405 (1975).

<sup>70</sup>Player, *supra* note 11, at 367; *see Albemarle Paper Co.*, 422 U.S. at 426-36; *cf. Connecticut v. Teal*, 457 U.S. 440, 451 (1982) (requiring written test to be “related to effective performance”).

<sup>71</sup>422 U.S. at 436.

<sup>72</sup>433 U.S. 321 (1977).

<sup>73</sup>*Id.* at 331-32.

<sup>74</sup>*Id.* at 332; Player, *supra* note 11, at 368. In a decision not fully embraced by the lower courts, the Supreme Court, in *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), implicitly adopted a relaxed rationality standard for business necessity. The Court opined that a Transit Authority (TA) rule excluding methadone users from employment, which had a disparate impact on minorities, “significantly served” TA's legitimate employment goals of safety and efficiency, even if its broad exclusionary authority excluded employees from positions for which they were qualified. *Id.* at 587 n.31.

<sup>75</sup>Player, *supra* note 11, at 368; *cf. Albemarle Paper Co.*, 422 U.S. at 427 (“question of job relatedness must be viewed in the context of the [employer's] operation and the history of the [challenged practice].”).

<sup>76</sup>Player, *supra* note 11, at 368 (citing *Crawford v. Western Elec. Co.*, 745 F.2d 1373 (11th Cir. 1984); *Williams v. Colorado Springs Sch. Dist. No. 11*, 641 F.2d 835 (10th Cir. 1981)).

Also unaffected by the new legislation is the holding in *Wards Cove Packing Co.* that a mere statistical imbalance in a defendant's workforce does not establish a prima facie case of discrimination.<sup>77</sup> In a disparate impact case the proper statistical comparison has not changed. The court still must compare the demographic makeup of the positions at issue in the defendant's workplace with the demographic makeup of the qualified population in the relevant labor market as a whole.<sup>78</sup>

### Procedural Changes

The new legislation eliminated an important procedural defense by increasing the time to file suit from thirty to ninety days after a potential plaintiff receives notice of a right to sue.<sup>79</sup> A federal employee, however, still must file "timely" charges of discrimination with the agency and must exhaust all agency administrative procedures before he or she may file suit.<sup>80</sup>

### Mixed Motive Defense

Mixed motive cases arise when the employer considers both illegitimate factors—such as an individual's race, color, religion, sex, or national origin—and legitimate factors in making an employment decision. In *Price Waterhouse v. Hopkins*,<sup>81</sup> the Supreme Court held that an employer can escape liability for a violation of Title VII, if the employer establishes that it would have made the same employment decision even if it had not taken impermissible factors into account.<sup>82</sup>

The new legislation parallels the Eighth Circuit's holding in *Bibbs v. Block*<sup>83</sup> by separating the issues of liability and remedy in mixed motive cases. In *Bibbs* the Eighth Circuit held that a plaintiff can establish a violation of Title VII by proving that a discriminatory motive

had played some part in the challenged employment decision.<sup>84</sup> At a minimum, a plaintiff then would be entitled to a declaratory judgment, partial attorney fees, and injunctive relief.<sup>85</sup> To limit further relief, such as reinstatement, promotion, or backpay, the defendant would have to prove by a preponderance that it would have taken the same employment action absent the proven discrimination.<sup>86</sup>

The Civil Rights Act of 1991 partially removed the mixed motive defense by declaring that an unlawful employment practice is established "when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."<sup>87</sup> Like *Bibbs*, the new legislation permits a defendant to limit the plaintiff's award by demonstrating that it would have taken the same action in the absence of the illegal discrimination.<sup>88</sup> If the defendant meets this burden, the court must limit the plaintiff's relief to declaratory relief, injunctive relief, partial attorneys' fees, and costs.<sup>89</sup> The legislation specifically precludes the court from awarding damages or ordering "any admission, reinstatement, hiring, promotion or payment."<sup>90</sup>

### Retroactivity

The Act is vague regarding the retroactive applicability of its provisions to cases pending in court or at the administrative level. Section 402 states only that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."<sup>91</sup>

A court generally must apply a civil<sup>92</sup> statute prospectively, absent clear evidence that the legislature intended

<sup>77</sup> *Wards Cove Packing Co.*, 109 S. Ct. at 2122; see also 137 Cong. Rec. S15,473 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond) (Act shifts burden of proof to employer, but "on all other issues this Act leaves existing law undisturbed").

<sup>78</sup> 109 S. Ct. at 2121 (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977)); see also *Beazer*, 440 U.S. at 586 n.29.

<sup>79</sup> Civil Rights Act of 1991 § 114(1), 105 Stat. at 1079 (amending 42 U.S.C. § 2000e-16 (1988)).

<sup>80</sup> 137 Cong. Rec. S15,485 (daily ed. Oct. 30, 1991) (interpretive memorandum of Senators Cohen, Danforth, Hatfield, Spector, Chafee, Durenberger, and Jeffords). Senator Kennedy agreed with this portion of the interpretive memorandum. See *id.* at S15,485.

<sup>81</sup> 490 U.S. 228 (1989).

<sup>82</sup> *Id.* at 242.

<sup>83</sup> 778 F.2d 1318 (8th Cir. 1985); see Note, *supra* note 61, at S-2.

<sup>84</sup> *Bibbs*, 778 F.2d at 975.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Civil Rights Act of 1991 § 107(a), 105 Stat. at 1075 (adding subsection (m) to 42 U.S.C. § 2000e-2 (1988)). See generally 137 Cong. Rec. S15,476 (daily ed. Oct. 30, 1991).

<sup>88</sup> Civil Rights Act of 1991 § 107(b), 105 Stat. at 1075.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Civil Rights Act of 1991 § 402(a), 105 Stat. at 1099.

<sup>92</sup> Ex post facto considerations arise only in criminal or penal statutes. Hilde E. Kahn, *Completed Acts, Pending Cases, and Conflicting Presumptions: The Retroactive Application of Legislation After Bradley*, 13 George Mason U.L. Rev. 231 n.2 (1990) (citing *Hammond v. United States*, 786 F.2d 8, 16 (1st Cir. 1986)). The prohibition against Bills of Attainder applies only to legislation that can impose punishment. *Id.* (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977); *United States v. Tyson*, 25 Env't Rep. Cas. (BNA) 1897, 1908 (E.D. Pa. 1986)).

otherwise.<sup>93</sup> Indeed, the Supreme Court recently endorsed this general principle of statutory construction.<sup>94</sup> In *Bowen v. Georgetown University Hospital*<sup>95</sup> the Supreme Court held that the Secretary of Health and Human Services had no authority under the Medicaid Act<sup>96</sup> to promulgate retroactive cost-limit rules.<sup>97</sup> Observing succinctly that "retroactivity is not favored in the law,"<sup>98</sup> the Court stated that "congressional enactments ... will not be construed to have retroactive effect unless their language requires this result."<sup>99</sup>

Contrary to this general principle of prospective application,<sup>100</sup> in *Bradley v. School Board of Rich-*

*mond*<sup>101</sup> the Court applied the Emergency School Aid Act,<sup>102</sup> which authorizes federal courts to award reasonable attorneys' fees in school desegregation cases, to a case in which the propriety of a fee award had been pending resolution on appeal when the statute became law.<sup>103</sup> The Court anchored its holding on the "principle that a court is to apply the law in effect at the time it renders its decision" unless manifest injustice would result or legislative intent precluded retroactive application.<sup>104</sup>

The circuits have split over which line of cases to follow. The Second,<sup>105</sup> Fourth,<sup>106</sup> Fifth,<sup>107</sup> Sixth,<sup>108</sup> Eighth,<sup>109</sup> Tenth,<sup>110</sup> and Federal<sup>111</sup> Circuits, and the Court of Appeals for the District of Columbia<sup>112</sup> follow

<sup>93</sup> Kahn, *supra* note 92, at 237; see also *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) ("principle that statutes operate only prospectively ... is familiar to every law student"); *Union P.R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *Nelson v. Ada*, 878 F.2d 277, 280 (9th Cir. 1989) ("As a general rule, legislative enactments ... apply only prospectively"); *Dion v. Secretary of Health & Human Servs.*, 823 F.2d 669, 671 (1st Cir. 1987) (as a general rule "legislation must be considered as addressed to the future, not to the past"); *Anderson v. US Air, Inc.*, 818 F.2d 49, 53 (D.C. Cir. 1987) ("statutes affecting substantive rights and liabilities are presumed to have only prospective effect") (quoting *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985)); *In re District of Columbia Worker's Compensation Act*, 554 F.2d 1075, 1079 (D.C. Cir. 1976); *Ralis v. RFE/RL Inc.*, 770 F.2d 1121, 1126 (D.D.C. 1985).

<sup>94</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[r]etroactivity is not favored in the law"); cf. *Kaiser Aluminum & Chem. Corp. v. Bonjomo*, 110 S. Ct. 1570, 1579 (1990) (Scalia, J., concurring).

<sup>95</sup> 488 U.S. 204 (1988).

<sup>96</sup> 42 U.S.C. § 1395x(v)(1)(A) (1988).

<sup>97</sup> *Bowen*, 488 U.S. at 209.

<sup>98</sup> *Id.* at 208.

<sup>99</sup> *Id.* (citing *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928)).

<sup>100</sup> One commentator has opined that *Bradley* conflicts with this long standing rule only when a change in legislation affects a party's liability for an act completed before the statute's enactment. See Kahn, *supra* note 92, at 237.

<sup>101</sup> 416 U.S. 696 (1974).

<sup>102</sup> 20 U.S.C. § 1617 (1970 & Supp. II) (repealed 1978). Section 718 of Title VII of this act authorized an award of attorneys' fees. See *Bradley*, 416 U.S. at 709.

<sup>103</sup> *Bradley*, 416 U.S. at 710. Recognizing the absence of any specific statutory authority for an attorney fee award, the district court based the award on its general equity power. *Id.* at 706.

<sup>104</sup> *Id.* at 711; accord *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969). The Senate authors of the Act's effective date provision specifically disapproved of these two cases. 137 Cong. Rec. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth).

<sup>105</sup> *Lehman v. Burnley*, 866 F.2d 33, 37 (2d Cir. 1989); *D'Arbois v. Sommoliers' Cellars*, 741 F. Supp. 489, 490 (S.D.N.Y. 1990).

<sup>106</sup> *Leland v. Federal Ins. Admin.*, 934 F.2d 524, 527 (4th Cir. 1991) ("[i]t is a fundamental and well established principle of law, however, that statutes are presumed to operate prospectively unless retroactive application appears from the plain language of the legislation") (citing *Bowen*).

<sup>107</sup> *Walker v. United States Dep't of Hous. & Urban Dev.*, 912 F.2d 819, 831 (5th Cir. 1990) ("the law disfavors retroactivity"); *Senior Unsecured Creditor's Comm. of First Republic Bank Corp. v. Federal Deposit Ins. Corp.*, 749 F. Supp. 758, 773 (N.D. Tex. 1990); see *Ramsey v. Stone*, No. EP-90-CA-361-H (W.D. Tex. Jan. 30, 1992) (citing *Bowen*, the court held that the Act is not retroactive). But cf. *La Cour v. Harris County*, 57 Fair Empl. Prac. Cas. (BNA) 622 (S.D. Tex. 1991) (permitting, without explanation, jury trial under Civil Rights Act of 1991).

<sup>108</sup> *United States v. Murphy*, 937 F.2d 1032, 1037-38 (6th Cir. 1991) (following *Bowen*'s presumption against retroactive application affecting substantive rights and liabilities, but recognizing a narrow *Bradley* application for purely procedural changes); see also *Johnson v. Rice*, No. 2:85-CV-1318 (S.D. Ohio Jan. 24, 1992) (LEXIS, Genfed library, Dist. file) (following *Murphy*, the court ruled that the Act is not retroactive regarding compensatory damages, but does apply to demand for a jury trial, which is a procedural matter; however, because the right to a jury depends upon the right to seek compensatory damages, a jury trial was unavailable in the instant case).

<sup>109</sup> *Simmons v. A.L. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991) ("[t]he better rule is that of *Georgetown Hospital*"); see also *Hill v. Broadway Indus.*, No. 90-1066-CV-W-3 (W.D. Mo. Jan. 7, 1992) (LEXIS, Genfed library, Dist. file). But cf. *Davis v. Tri-State Mack Distrib.*, 57 Fair Empl. Prac. Cas. 1025, 1027 (E.D. Ark. 1991) (with minimal discussion and no mention of *Simmons*, the court relied on "the remedial purposes of the legislation and the absence of any language therein against retroactive application" to hold that the Act is not retroactive).

<sup>110</sup> *Arnold v. Maynard*, 942 F.2d 761, 762 n.2 (10th Cir. 1991) ("we elected to follow *Bowen*'s holding") (citing *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990), cert. denied, 111 S. Ct. 799 (1991)); see *Hansel v. Public Serv. Co.*, 57 Fair Empl. Prac. Cas. (BNA) 858, 866 (D. Colo. 1991) (following *DeVargas* to hold that the Act is not retroactive).

<sup>111</sup> *Sargisson v. United States*, 913 F.2d 918, 923 (Fed. Cir. 1990) ("prefer the longer-standing rule that retroactivity is not presumed."); *Mai v. United States*, 22 Cl. Ct. 664, 667-68 (1991).

<sup>112</sup> *Alpo Pet Foods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 n.6 (D.C. Cir. 1990) ("[b]ecause the *Georgetown Hospital* rule seems more faithful to the older decisions that are being interpreted in the retroactivity debate ... we rely on that rule here") (opinion of Judge—now Justice—Clarence Thomas); see also *Van Meter v. Barr*, 57 Fair Empl. Prac. Cas. 769 (D.D.C. 1991) (citing *Alpo Pet Foods, Inc.*, the court ruled that the Act is not retroactive).

the *Bowen* presumption against the retroactive application of new statutes.<sup>113</sup> Conversely, the Seventh,<sup>114</sup> Eleventh,<sup>115</sup> and possibly the First<sup>116</sup> Circuits have adopted the *Bradley* presumption of retroactivity.

Recently, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*,<sup>117</sup> the Court held that an amendment to the federal statute governing the award of postjudgment interest<sup>118</sup> did not apply to judgments entered before the amendment's effective date.<sup>119</sup> The Court premised its holding on the plain language of the statute and on the absence of legislative intent to the contrary.<sup>120</sup> Although it remarked on the "apparent tension" between *Bradley* and *Bowen*, the Court declined to reconcile the conflicting line of cases.<sup>121</sup>

In his concurring opinion to *Kaiser Aluminum*, Justice Scalia criticized the Court severely for failing to reconcile the "irreconcilable contradiction" of *Bradley* and *Bowen*.<sup>122</sup> Justice Scalia called for the other justices to reverse *Bradley*<sup>123</sup> and to reaffirm the "clear rule of con-

struction that has been applied, except for these last two decades of confusion, since the beginning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only."<sup>124</sup>

Were a court to adopt the *Bradley* analysis, it still should apply the Civil Rights Act of 1991 prospectively. In *Bradley*, the Supreme Court recognized several exceptions to the retroactive application of new legislation. One exception exists when a legislative history evidences a congressional intent that the statute should not be applied retroactively. The Court noted that "a court is to apply the law in effect at the time it renders its decisions, unless ... there is ... legislative history to the contrary."<sup>125</sup> The weight of the Act's legislative history indicates that its drafters did not intend the new legislation to be retroactive in its application.<sup>126</sup> Indeed, the original Senate cosponsors of the Act—who drafted the effective date section—stated that they did not intend the new legislation to have any retroactive effect.<sup>127</sup> Accordingly, the

<sup>113</sup> Cf. *Ayala-Chavez v. Immigration & Naturalization Serv.*, 945 F.2d 288, 294 & n.9 (9th Cir. 1991) (recognizes "general rule of non-retroactivity" but declines to reconcile conflict between *Bowen* and *Bradley*). But cf. *Stender v. Lucky Stores, Inc.*, No. C-88-1467 (N.D. Cal. Dec. 19, 1991) (citing *In Re Reynolds*, 726 F.2d 1420, 1423 (9th Cir. 1984), the court held that the Act favors retroactive application).

Three district courts in the Third Circuit have held that the Act's provisions are not retroactive. See *Futch v. Stone*, No. 3:CV-90-0826 (M.D. Pa. Jan. 13, 1992) (finding that the Act is not retroactive on sovereign immunity grounds, but finding Justice Scalia's concurring opinion in *Kaiser Aluminum & Chem. Corp.* compelling); *Alexandre v. AMP, Inc.*, 57 Fair Empl. Prac. Cas. 768 (M.D. Pa. 1991) (holding, without opinion, that the Act is not retroactive); *Sinnovitch v. Port Auth. of Allegheny County*, No. 89-1524 (W.D. Pa. Dec. 31, 1991) (relying on legislative history and new Equal Employment Opportunity Commission guidelines to hold that the Act is not retroactive).

<sup>114</sup> *Federal Deposit Ins. Corp. v. Wright*, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991) (no prejudice in applying *Bradley* to facts of particular case); see also *Mojica v. Gannett Co.*, 57 Fair Empl. Prac. Cas. 537 (N.D. Ill. 1991) (citing *Wright*, the court held that the Act is retroactive).

<sup>115</sup> *United States v. Peppertree Apartments*, 942 F.2d 1555, 1561 n.3 (11th Cir. 1991); accord *King v. Shelby Medical Ctr.*, No. 91AR-2258-S (N.D. Ala. 1991) (citing *Peppertree Apartments*).

<sup>116</sup> *Demars v. First Serv. Bank for Sav.*, 907 F.2d 1237, 1239-40 (1st Cir. 1990); cf. *Timberland Design, Inc. v. Federal Deposit Ins. Corp.*, 745 F. Supp. 784, 788 n.2 (D. Mass. 1990) ("Demars suggests that under First Circuit case law the touchstone for deciding which presumption to apply ... is whether retroactive application alters substantive rules of conduct and disappoints private expectations"). *Contra* *Dion v. Secretary of Health & Human Serv.*, 823 F.2d 669, 671 (1st Cir. 1987); *Rhode Island Higher Educ. Assistance Auth. v. Cavazos*, 749 F. Supp. 414, 419 (D.R.I. 1990) (applying legislation prospectively).

<sup>117</sup> 110 S. Ct. 1570 (1990).

<sup>118</sup> 28 U.S.C. § 1961 (1982) (amended 1983 and 1986).

<sup>119</sup> *Kaiser Aluminum & Chem. Corp.*, 110 S. Ct. at 1576; Kahn, *supra* note 92, at 235.

<sup>120</sup> *Kaiser Aluminum & Chem. Corp.*, 110 S. Ct. at 1576.

<sup>121</sup> *Id.* at 1577.

<sup>122</sup> *Id.* at 1579 (Scalia, J. concurring).

<sup>123</sup> Justice Scalia attacked *Bradley*'s weak precedential basis, contrasted its holding with the long-standing clear intent rule, objected to it as contrary to fundamental notions of justice, and expressed concern over the tremendous latitude judges were given by *Bradley*'s method of determining the applicability of exceptions to the rule. Kahn, *supra* note 92, at 236-36; *Kaiser Aluminum & Chem. Corp.*, 110 S. Ct. at 1579-88.

<sup>124</sup> *Kaiser Aluminum & Chem. Corp.*, 110 S. Ct. at 1579.

<sup>125</sup> *Bradley*, 416 U.S. at 711; see also *Kaiser Aluminum & Chem. Corp.*, 110 S. Ct. at 1577 (1990) ("under [*Bradley*] where the congressional intent is clear, it governs.").

<sup>126</sup> 137 Cong. Rec. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth); *id.* at S15,485 (reflecting views of Senators Danforth, Cohen, Hatfield, Spector, Chafee, Durenberger and Jeffords); *id.* at S15,478 (reflecting views of Bush administration and Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond); *id.* at H9543 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde) ("provisions of this bill are prospective in nature, not retroactive"); *id.* at S15,952 (statement of Sen. Dole); *id.* at S15,966 (daily ed. Nov. 5, 1991) (Senators Gorton, Durenberger and Simpson). But cf. *id.* at S15,485 (daily ed. Oct. 30, 1991); *id.* at S15,963 (daily ed. Nov. 5, 1991) (statement of Sen. Kennedy) (courts will decide). Compare *Meter v. Barr*, No. 91-0027 (D.D.C. Dec. 18, 1991) (congressional intent unclear, but language of statute indicates Act applies prospectively) and *James v. American Int'l Recovery, Inc.*, No. 1:89-CV-321 (N.D. Ga. Dec. 3, 1991) (congressional intent indicates Act does not apply to cases arising before Nov. 21, 1991) with *Mojica v. Gannett Co., Inc.*, 57 Fair Empl. Prac. Cas. (BNA) 537 (N.D. Ill. 1991) (relying on *Bradley*, court held that legislative history does not indicate statute is to be applied prospectively only). See generally *New Civil Rights Law Does Not Apply To Pending Cases, DJ Brief Maintains*, Gov't Empl. Rel. Rep. (BNA) No. 1443, at 1580-81 (Dec. 9, 1991) (discussing *James* and *Mojica*).

<sup>127</sup> 137 Cong. Rec. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth); *id.* at S15,493 (statement of Sen. Murkowski).

new legislation should not apply to cases filed before November 21, 1991.<sup>128</sup>

### Conclusion

The Civil Rights Act of 1991 significantly altered federal discrimination law. It exposes the Army to greater

liability for the conduct of its employees. Agency counsel can expect an increase in the number and length of discrimination cases as judges attempt to read meaning into the Act's ambiguous provisions and as plaintiffs take advantage of greater financial and procedural incentives to sue.

<sup>128</sup> Whether the new legislation applies to cases whose cause of action—a discriminatory act—arose before the enactment date is less certain. Specific support for that proposition appears in the legislative history, albeit only intermittently. *See id.* at H9548 (daily ed., Nov. 7, 1991) (statement of Rep. Hyde) (no retroactive application to "conduct occurring before the date of enactment of this Act."). The Equal Employment Opportunity Commission has asserted that the new legislation does not apply to discriminatory conduct occurring before November 21, 1991. Equal Employment Opportunity Comm'n Directive 915.002, Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct (Dec. 27, 1991), reprinted in 159 EEOC Compl. Man. (BNA) N:6063 (Jan. 27, 1992) (notices supplement); *see also EEOC Contends That Civil Rights Act Is Not Retroactive*, Wash. Post, Jan. 1, 1992, at A5, col. 2. Furthermore, in *Bowen* the Court apparently held that "courts must not apply a statute that changes the legal consequences of completed acts without evidence of clear legislative intent to do so. *See Kahn, supra* note 92, at 234 (emphasis added).

## Mootness: The Unwritten Rule for Rejecting Equal Employment Opportunity Complaints

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### Introduction

How many times have you heard a commander or a supervisor lament that the equal employment opportunity (EEO) system<sup>1</sup> breeds meritless complaints that never go away? Even after an employee has left the agency, his or her unfounded complaints about "harassment" and a "hostile environment" continue to plod their way through the system, wasting taxpayers' money and productive personnel time.

For some complaints, this may be a painfully accurate description. The administrative process may take several years in some cases. Many complaints, however, can be rejected or canceled based on the legal doctrine of mootness as it is applied by the Equal Employment Opportunity Commission (EEOC). This article will outline the concepts involved in applying mootness to EEO complaints.

### Historical Analysis

The current EEOC rules<sup>2</sup> allow an agency to reject a formal complaint of discrimination only for specific, restricted reasons.<sup>3</sup> Mootness is not one of the listed bases for rejection. Nevertheless, agencies can read the established legal doctrine of "mootness" into the rules and can use it to reject or cancel allegations of discrimination.<sup>4</sup>

The seminal case for mootness analysis is *County of Los Angeles v. Davis*,<sup>5</sup> in which the United States Supreme Court developed a two-part mootness test from existing Court precedent. The Court held that an agency may dismiss a complaint as moot if: (1) the agency has no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have eradicated completely the effects of the alleged violation.<sup>6</sup> A "live" controversy no longer exists if both requirements are sat-

<sup>1</sup> *See generally* 29 C.F.R. pt. 1613 (1990) (implementing 42 U.S.C. § 2000e-16 (1988)); Army Regulation 690-600, Civilian Personnel: Equal Employment Opportunity Discrimination Complaints (18 Sept. 1989) [hereinafter AR 690-600].

<sup>2</sup> The EEOC rules for processing complaints of discrimination in the federal sector appear at 29 C.F.R. pt. 1613 (1991).

<sup>3</sup> An agency shall reject or cancel an allegation under 29 C.F.R. § 1613.212 that (1) fails to state a claim or that states a claim already decided or pending; (2) alleges the agency is proposing to take an action that may be discriminatory; (3) is pending before a United States district court; (4) is untimely; (5) was pursued under a negotiated grievance procedure; (6) has not been prosecuted; or (7) was the subject of an offer of full relief. 29 C.F.R. § 1613.215 (1991); *see also* AR 690-600, para. 2-5 (implementing EEOC rules on acceptance of complaints).

<sup>4</sup> On October 31, 1989, the Commission proposed new rules to govern the processing of federal-sector EEO complaints. The proposed rules are to be published as 29 C.F.R. pt. 1614. *See* 54 Fed. Reg. 45,747 (1989); *see also infra* notes 29-30 and accompanying text. After a lengthy comment and review period, the EEOC modified the proposed rules. Because it did not consider these changes substantive, the EEOC did not republish the rules in the *Federal Register*; however, it did circulate the modifications to federal agencies for review and comment. At present, no fixed timetable exists for issuance of final rules.

On October 22, 1991, legislation was introduced that would alter existing administrative complaint procedures significantly. *See* H.R. 3613, 102d Cong., 1st Sess. (1991). If enacted, this legislation would reduce agency participation in the EEO process sharply, but would not affect directly the proposed rules' simplification of the mootness test. *See id.*

<sup>5</sup> 440 U.S. 625 (1979).

<sup>6</sup> *Id.* at 631.

isfied because "neither party [then] has a legally cognizable interest in the final determination of the underlying questions of fact and law."<sup>7</sup>

Over the years, the EEOC has struggled to reconcile the *Davis* test with its own rules. In *Lurk v. United States Postal Service*<sup>8</sup> the EEOC refused to consider mootness as a ground for rejecting complaints. In that case, the Postal Service had rejected Lurk's complaint, holding that the complaint became moot when the Postal Service removed from Lurk's personnel records a letter of warning to which Lurk had objected. On review, the EEOC stated that "[n]either mootness, nor [a] request for inappropriate relief are grounds for rejection of a complaint under EEOC Regulations." In *Guyton v. United States Postal Service*,<sup>9</sup> however—which the EEOC decided several months before it decided *Lurk*—the Commission affirmed without explanation the Postal Service's rejection for mootness of an appellant's complaint. The EEOC made no effort to reconcile these conflicting decisions.

### Recognition of "Mootness" by the EEOC

In 1985, the Commission first found mootness to be cognizable under its rules. In *Burson v. United States Postal Service*,<sup>10</sup> the complainant alleged that the Postal Service had subjected her to racial and reprisal discrimination when it denied her unemployment benefits after firing her. Noting that the complainant eventually had collected state unemployment compensation, the agency rejected her EEO complaint for mootness. The EEOC affirmed the rejection. It stated that, although mootness is

not enumerated specifically as a basis for rejection in the EEOC rules, an agency may reject a moot complaint because the complainant "no longer [is] aggrieved" under title 29, Code of Federal Regulations (C.F.R.) section 1613.212(a) when a live controversy no longer exists.

The EEOC since has elaborated on the *Burson* analysis. Now it regularly permits agencies to reject complaints for mootness. In its most recent opinions, the Commission has remarked repeatedly that "inherent in the regulations' characterization of aggrieved is that some direct harm must have affected a term, condition, or privilege of the appellant's employment."<sup>11</sup> If a complaint is moot, the complainant no longer is aggrieved under 29 C.F.R. section 1613.212(a) and, therefore, lacks a valid claim as contemplated by 29 C.F.R. section 1613.215(a)(1).<sup>12</sup> Accordingly, the agency may reject or cancel the complaint for failure to state a claim.<sup>13</sup>

### Mootness Confused

Occasionally, the Commission dispenses with its "no longer aggrieved" analysis and affirms an agency's rejection solely for mootness. In *Pangarova v. Department of the Army*,<sup>14</sup> the agency removed the appellant from her engineering position after she forfeited her security clearance. Pangarova responded by filing a mixed case appeal with the Merit Systems Protection Board (MSPB),<sup>15</sup> claiming that she was the victim of unlawful gender, nationality, age, and reprisal discrimination.<sup>16</sup> The MSPB affirmed her removal and the EEOC

<sup>7</sup>*Id.*

<sup>8</sup>EEOC No. 01832207 (Equal Employment Opportunity Comm'n June 18, 1984).

<sup>9</sup>EEOC No. 01820933 (Equal Employment Opportunity Comm'n April 30, 1984).

<sup>10</sup>EEOC No. 01841116 (Equal Employment Opportunity Comm'n Jan. 28, 1985). Unfortunately, this decision did not signal the end of the confusion over application of mootness in EEOC cases. In *Pennison v. United States Postal Serv.*, EEOC No. 01842755 (Equal Employment Opportunity Comm'n Feb. 12, 1985), the EEOC declared that "EEOC Regulation 29 C.F.R. sec. 1613.215 narrowly circumscribes the permissible grounds for cancellation of an EEO complaint; mootness is not among them."

<sup>11</sup>E.g., *Colantouni v. Export-Import Bank Agency*, EEOC No. 01902813 (Equal Employment Opportunity Comm'n Aug. 10, 1990).

<sup>12</sup>This provision requires a complainant to state an allegation over which the agency has control. See 29 C.F.R. § 1613.215(a)(1) (1991). The parallel provision in the proposed EEOC rules is 29 C.F.R. § 1614.107. See 54 Fed. Reg. 45,747, 45,754 (1989) (proposed Oct. 31, 1989).

<sup>13</sup>*Cf.* AR 690-600, paras. 2-5, 2-6 (setting forth provisions parallel to the EEOC rules).

<sup>14</sup>EEOC No. 01893171 (Equal Employment Opportunity Comm'n Apr. 26, 1990). For a historical perspective of the *Pangarova* case, see also *Pangarova v. Department of the Army*, 42 M.S.P.R. 319 (1990).

<sup>15</sup>An adverse action may be appealed by "mixed case complaint" or "mixed case appeal" procedures if it is subject to the jurisdiction of the Merit Systems Protection Board (MSPB) and includes allegations of discrimination. A mixed case complaint is processed first as a complaint of discrimination and then appealed to the Board. See 5 C.F.R. § 161; 29 C.F.R. § 1613.401; see also 54 Fed. Reg. 45,747, 45,758 (1989) (to be codified at 29 C.F.R. § 1614.302) (proposed Oct. 31, 1989). A mixed case appeal is heard first by the MSPB and may be petitioned to the EEOC. 5 C.F.R. § 1201.151; 29 C.F.R. § 1613.402; see also 54 Fed. Reg. 45,747, 45,758 (1989) (to be codified at 29 C.F.R. § 1614.303) (proposed Oct. 31, 1989).

<sup>16</sup>Commission rules at 29 C.F.R. § 1613.261 guarantee that any individual involved in the EEO process will not be subject to reprisal for his or her participation in the EEO process. This guarantee derives directly from title VII of the Civil Rights Act. See 42 U.S.C. § 2000e-3(a) (1988); *Ayon v. Sampson*, 547 F.2d 446, 449-50 (9th Cir. 1976); *Sorrells v. Veterans' Admin.*, 576 F. Supp. 1254, 1258 (D. Ohio 1983) ("Congress intended to include available remedies against retaliatory discharges when it amended the 1964 Civil Rights Act ... and extended its coverage to the federal government"). A complainant may allege reprisal as an additional basis for an EEO complaint. See, e.g., *Chen v. General Accounting Office*, 821 F.2d 732 (D.C. Cir. 1987); *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984). The standard of proof for an allegation of discrimination based on reprisal differs from the tests applied in other cases. See *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986); see also *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987).

upheld the MSPB decision to reject Pangarova's discrimination allegations.<sup>17</sup> The appellant then filed an EEO complaint against the labor counselor and EEO officer, claiming that they had made false and misleading statements during the MSPB proceedings. Affirming the Army's cancellation of Pangarova's EEO complaint, the EEOC stated simply that the finalization of the MSPB decision and the EEOC's affirmation of that decision had rendered her other allegations moot.<sup>18</sup> Significantly, the Commission did not rule that Pangarova was "no longer aggrieved"; nor did it rely upon other language derived from the EEOC rules as a basis for the affirmation.

In some cases, however, the EEOC still vacillates on whether mootness applies under its rules. For example, in *Wynne v. Department of the Army*,<sup>19</sup> the complainant alleged that the Army had failed to stop other personnel from smoking in his presence, had failed to make him acting civilian personnel officer, and essentially had treated him as *persona non grata*. He claimed that his Army supervisor's motivation for mistreating him in this fashion was based on his race, gender, handicap, and age. After the complainant retired, the Army rejected his EEO complaints for failure to state a claim. The EEOC initially ordered the Army to reinstate the complaints, warning that mootness is not a proper basis for rejection under the EEOC rules. Upon request for reopening, however, the Commission reversed itself. In its second opinion, the Commission did not refer to the "no longer aggrieved" standard. Instead, it cited strong policy reasons for recognizing mootness, declaring: "In virtually all complaints which involve mootness, the complainant is not an agency employee and the allegations are non-economic in nature. Failure to remove these complaints from the system burdens an already burdened system with remediless complaints."<sup>20</sup>

#### Analysis of Moot Issues

Often the focal issue in a mootness analysis is the harm that the complainant claims to have suffered. A complainant generally continues to be "aggrieved" as long as he or she may recover backpay or other equitable monetary relief. The absence of any reasonable possibility of pecuniary recovery, however, is not necessarily dispositive. A complaint that does not involve monetary relief still may

present a "live" controversy and, therefore, might not be subject to rejection or cancellation for mootness.

In *Diggs v. Department of Veterans' Affairs*<sup>21</sup> the appellant alleged that the agency had subjected her to handicap discrimination and reprisal through verbal and written reprimands and harassment. After it withdrew the reprimands, the agency rejected the appellant's continuing complaint, asserting that she had failed to state a claim. The EEOC reversed the agency's rejection. Although it found that the agency had based the reprimands on the appellant's performance, it held that an issue still existed concerning the appellant's allegations that her supervisor had harassed her and that the government had failed to accommodate her handicap.

The EEOC analysis in *Diggs* certainly would have differed had the appellant left the agency. Because the appellant continued to work for the Department of Veterans' Affairs after filing her complaint, the Commission found that the agency reasonably could not conclude that the alleged violations would not recur. Accordingly, it held that the agency had failed to satisfy the first prong of the *Davis* mootness test. The Commission's holding in *Diggs* is hardly unique. The EEOC typically reviews a mootness rejection or cancellation with greater scrutiny when a complainant continues to work for the agency.

The EEOC often reverses decisions that cancel only portions of a complaint for mootness. If any allegation remains uncorrected or unresolved, all the complainant's allegations, taken together, may indicate a pattern of discriminatory conduct. For example, the appellant in *Dubose v. Defense Logistics Agency*<sup>22</sup> claimed that he had suffered a lower performance rating, limited promotion opportunities, harassment, and diminished job responsibilities because of a supervisor's racial discrimination against him. The agency reassigned the appellant, then cancelled as moot his allegations of harassment and diminished job responsibilities. The Commission reversed. It found that the cancelled allegations were intertwined with the other issues and could be probative of discrimination.<sup>23</sup> Significantly, Dubose, like Diggs, still worked for the agency when the EEOC reviewed the cancellation of his claim.

<sup>17</sup>Under mixed case appeal procedures, an appellant may appeal the decision on an allegation of discrimination only to the EEOC. See 5 C.F.R. § 1201.161; 29 C.F.R. § 1613.403; see also 54 Fed. Reg. 45,747, 45,758 (1989) (to be codified at 29 C.F.R. § 1614.303) (proposed Oct. 31, 1989).

<sup>18</sup>"A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Pangarova*, EEOC No. 01893171 (citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

<sup>19</sup>EEOC No. 05890962 (Equal Employment Opportunity Comm'n Nov. 9, 1989).

<sup>20</sup>*Id.*

<sup>21</sup>EEOC No. 019003169 (Equal Employment Opportunity Comm'n Sept. 12, 1990).

<sup>22</sup>EEOC No. 05900273 (Equal Employment Opportunity Comm'n June 18, 1990).

<sup>23</sup>In this decision, the Commission strongly supported mootness as an inherent principle contained in the EEOC rules. Although *Dubose* later was reversed on other grounds, it may be cited as authority for rejecting or cancelling complaints for mootness when a complainant no longer is aggrieved.

## Rejecting or Canceling Moot Complaints

When reviewing an EEO complaint for acceptance,<sup>24</sup> a labor counselor must consider whether the complainant's allegations continue to present "live" controversies. The following is a list of relevant questions in a mootness analysis:

- Has the complainant left the agency or been reassigned?
- Has an alleged offending supervisor left the agency?
- Has any agency already provided the complainant with the requested relief?
- Are any of the allegations in the complaint still unresolved?
- Could the agency award the complainant equitable monetary relief to compensate him or her for nonpromotion, nonselection, or a withheld step increase?

When an allegation is moot before an agency accepts or rejects a complaint, the agency should reject<sup>25</sup> the allegation in a separate letter that advises the appellant that he or she may appeal the rejection to the EEOC.<sup>26</sup> This letter also should cite clearly the EEOC rules that govern cases in which a complainant is "no longer aggrieved."<sup>27</sup>

Cancelling a complaint for mootness after it has been accepted is similar to processing an offer of full relief. The primary difference is that the agency need obtain no certification of "mootness" from the Equal Employment Opportunity Compliance and Complaints Review Agency

(EEOCCRA). Instead, the complaint is cancelled locally and the complainant is given appeal rights to EEOC.<sup>28</sup>

A rejection or cancellation based on mootness should explain clearly why the complainant no longer is aggrieved. The notice must include enclosures from, or references to, the administrative record to support the decision. The EEOC will overturn a decision if the agency fails to explain or document it adequately.

## New EEOC Rules

Application of the mootness doctrine in federal EEO practice should be much simpler if the EEOC implements its new rules.<sup>29</sup> In the proposed rules, the Commission has attempted to remedy its previous oversight by including mootness as an independent basis for rejection, or "dismissal," of a complaint.<sup>30</sup> Under these rules, the Commission could apply the *Davis* analysis directly, without having to resort to the hybrid, "no longer aggrieved" rationale.

## Conclusion

The volume of EEO complaints is growing in these times of employment unrest and uncertainty. Recently announced reductions in military personnel and Defense Department civilian employees should contribute to an increase in complaints in fiscal year 1992. Every labor counselor, however, can reduce his or her case load and preserve taxpayer dollars by screening formal complaints diligently for moot allegations before accepting them. A periodic review of case files also may reward the labor counselor by revealing moot complaints that are ripe for cancellation or for dismissal under the new rules. A labor counselor may find a review of this sort especially useful before he or she forwards a complainant's file to the EEOC for hearing.

<sup>24</sup> Army Regulation 690-600, paragraph 2-6a(3), states that an EEO officer should coordinate acceptance or rejection of a complaint with the labor counselor "when appropriate." For a labor counselor to review complaints before an EEO officer acts on the complaint is *always* appropriate. The issues framed in the acceptance letter are legal positions that the labor counselor later may have to defend. If an EEO officer fails or refuses to forward complaints for review before acceptance, the labor counselor should refer the matter to the commander.

<sup>25</sup> Allegations are "dismissed," instead of rejected, under proposed 29 C.F.R. pt. 1614. See *infra* note 30.

<sup>26</sup> The rejection is a final decision that the complainant may appeal to the EEOC. See 29 C.F.R. §§ 1613.215(b), 1613.231; see also 54 Fed. Reg. 45,747, 45,754 (1989) (to be codified at 29 C.F.R. § 1614.107) (proposed Oct. 31, 1989); *id.* at 45,760 (to be codified at 29 C.F.R. § 1614.401); AR 690-600, paras. 2-6, 2-12, 6-1. A rejection may be appealed to the EEOC Office of Federal Operations (formerly the Office of Review and Appeals). See 29 C.F.R. §§ 1613.215(b), 1613.231; see also 54 Fed. Reg. at 45,754, 45,760 (to be codified at 29 C.F.R. §§ 1614.107, 1614.401); AR 690-600, paras. 2-6, 2-12, 6-1.

<sup>27</sup> 29 C.F.R. §§ 1613.212, 1613.215(a) (1991); see also 54 Fed. Reg. 45,747, 45,753-54 (1989) (to be codified at 29 C.F.R. §§ 1614.106, 1614.107) (proposed Oct. 31, 1989).

<sup>28</sup> AR 690-600, paras. 2-6c, 2-18, 7-11b.

<sup>29</sup> See 54 Fed. Reg. 45,747 (1989) (to be codified at 29 C.F.R. pt. 1614) (proposed Oct. 31, 1989).

<sup>30</sup> A proposed rule at 29 C.F.R. pt. 1614 allows agencies to dismiss a complaint for mootness: "The agency shall dismiss that portion of a complaint ... [t]hat is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory." 54 Fed. Reg. 45,747, 45,754 (1989) (to be codified at 29 C.F.R. § 1614.107(5)) (proposed Oct. 31, 1989). The terms "cancel" and "reject" have been deleted in the proposed part 1614; complaints now are accepted or "dismissed." See *id.*

## Practical Problems of Sobriety Checkpoints

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The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>1</sup>

The message was clear—do not search without a warrant. Yet when the Fourth Amendment was written two hundred years ago, could any of the signatories have foreseen an intoxicated citizen travelling along a smoothly paved surface in a metal horseless carriage at more than sixty miles per hour? Could any of them have envisioned a time when 25,000 American lives would be lost each year at the hands of drunk drivers?<sup>2</sup> Absolutely not.

Not surprisingly, courts have developed numerous exceptions to the Fourth Amendment's absolute language over the last few decades. Although the law still protects a citizen's home as "his [or her] castle," it also gives law enforcement agencies a fighting chance in the war against crime.

One of the most important exceptions deals with automobiles. In *South Dakota v. Opperman*,<sup>3</sup> the Supreme Court held that one's expectations of privacy in an automobile and of freedom in its operation differ significantly from one's traditional expectations of privacy and freedom in one's residence.<sup>4</sup> Since *Opperman*, the Supreme Court has defined the scope of an individual's reasonable expectations of privacy in many situations arising from searches of automobiles, including searches pursuant to roadblock stops.

One of the first decisions to address roadblocks was *United States v. Martinez-Fuerte*.<sup>5</sup> In *Martinez-Fuerte*, officers of the United States Border Patrol set up a roadblock on the principal highway between San Diego and Los Angeles. They briefly stopped every northbound

vehicle, directing a small percentage of the drivers to pull off to a secondary area for further questioning. The Supreme Court ultimately upheld the Border Patrol's actions.<sup>6</sup>

Although *Martinez-Fuerte* dealt with a roadblock set up to detect illegal aliens, many of the principles upon which it was premised also apply to sobriety checkpoints. Acknowledging that "[t]he Fourth Amendment imposes limits on search and seizure power ... to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals,"<sup>7</sup> the *Martinez-Fuerte* Court nevertheless pointed out that these limits are *not* absolute. Instead, they require the courts to balance legitimate public interests against the Fourth Amendment interests of private individuals. In defining a person's privacy interest in an automobile, the Court emphasized that it "deal[t] neither with searches nor the sanctity of private dwellings, [which] ordinarily [must be] afforded the most stringent Fourth Amendment protection."<sup>8</sup> It concluded that "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant."<sup>9</sup> The Court also declared that law enforcement officials properly may "refer motorists selectively to ... [a] secondary inspection area ... on the basis of criteria that would not sustain a roving patrol stop."<sup>10</sup>

The Supreme Court more recently applied many of its findings in *Martinez-Fuerte* to a roadblock erected as a sobriety checkpoint in *Michigan v. Sitz*.<sup>11</sup> Criminal law practitioners should review carefully the way that law enforcement officials managed the roadblock in *Sitz* because the Court expressly found these methods constitutional.

In *Sitz*, an advisory committee made up of senior members of Michigan State Police, local law enforcement agencies, and the prosecuting attorney's office developed certain roadblock procedures. These procedures covered

<sup>1</sup> U.S. Const. amend. IV.

<sup>2</sup> See 4 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.8(d), at 71 (2d ed. 1987).

<sup>3</sup> 428 U.S. 364 (1976).

<sup>4</sup> *Id.* at 367 (citing *Cardwell v. Lewis*, 417 U.S. 583, 589 (1973)).

<sup>5</sup> 428 U.S. 543 (1976).

<sup>6</sup> *Id.* at 566.

<sup>7</sup> *Id.* at 554 (citations omitted).

<sup>8</sup> *Id.* at 561.

<sup>9</sup> *Id.* at 566.

<sup>10</sup> *Id.* at 563.

<sup>11</sup> 110 S. Ct. 2481 (1990).

everything from the selection of roadblock sites to publicity releases and the development of a checkpoint protocol for field officers. The committee also published advance notices that the state police would set up roadblocks on a particular day to identify drunk drivers, although it did not reveal exactly when the roadblock would be erected or where it would be located. Finally, the committee chose a specific site for the roadblock after reviewing traffic patterns, accident statistics, and arrest reports for individuals apprehended for drunk driving offenses.

When the state police actually set up the roadblock, they used signs and flashers to alert motorists of a stop ahead. They stopped all motorists and examined them briefly for signs of intoxication. The roadblock was in place for seventy-five minutes. During this time, police stopped 126 cars for an average delay of twenty-five seconds per car.

Each officer assigned to stop traffic was instructed to direct a motorist to a secondary checkpoint out of the traffic flow if he or she detected any sign that the driver was intoxicated. At the secondary checkpoint, the officer would check the driver's license and registration and, if appropriate, would conduct further sobriety tests. Police ultimately directed only two of the 126 drivers they stopped to perform field sobriety tests. Of these two drivers, police arrested one for driving under the influence of alcohol (DUI).<sup>12</sup>

The *Sitz* Court applied a balancing test to evaluate the constitutionality of the state police roadblock. Chief Justice Rehnquist, writing for the majority, observed that "[d]runk drivers cause an annual death toll of over 25,000 [lives] and in the same timespan cause nearly one million personal injuries and more than five billion dollars in property damage."<sup>13</sup> As the Chief Justice cogently noted, the staggering extent of this cost to society certainly points to a compelling government interest in preventing drunk driving.<sup>14</sup> The objective intrusion on the liberty of the individuals stopped at the roadblock—on the average, a delay of twenty-five seconds—was slight in comparison.<sup>15</sup> The Court also emphasized that checkpoint stops are much less intrusive than roving stops.<sup>16</sup> At checkpoints or roadblocks, drivers can see that police

are stopping all the other cars around them, the officers' uniforms are a visible symbol of their lawful authority, and the drivers are much less likely to be startled or annoyed by the intrusion.<sup>17</sup> Significantly, Chief Justice Rehnquist pointed out that "[t]he 'fear and surprise' to be considered are *not* the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law abiding motorists by the nature of the stop."<sup>18</sup>

Another issue addressed by the *Sitz* Court was the "effectiveness" of the program—what former Chief Justice Warren Burger described in *Brown v. Texas* as "the degree to which the seizure advances the public interest."<sup>19</sup> At first glance, *Sitz* appears to rest on shaky ground. Surely a ratio of one drunk driver apprehended out of 126 drivers stopped is almost per se "ineffective." The Court, however, pointed out that

[t]his passage from *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunk drivers is preferable. For purposes of Fourth Amendment analysis the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and responsibility for, limited public resources, including a finite number of police officers.<sup>20</sup>

In its final analysis, the *Sitz* Court determined that the procedures the state police used here were proper, concluding that "the balance of the state's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the State Program."<sup>21</sup>

### Constitutional Roadblocks

*Sitz* demonstrates that law enforcement officials should draft guidelines carefully before proceeding with any roadblock or checkpoint. The first item that officials

<sup>12</sup> A second driver who drove through the roadblock without stopping also eventually was stopped and arrested for driving under the influence. *Id.* at 2484.

<sup>13</sup> *Id.* at 2486 (citing 4 LaFare, *supra* note 2, § 10.8(d), at 71).

<sup>14</sup> See *id.* at 2485.

<sup>15</sup> *Id.* at 2486.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> *Brown v. Texas*, 443 U.S. 47, 51 (1979).

<sup>20</sup> *Sitz*, 110 S. Ct. at 2487.

<sup>21</sup> *Id.* at 2488.

should consider is the purpose of the roadblock. Ideally, the roadblock's primary purpose should be to *deter* drunk driving by increasing public perception of the seriousness of the DUI problem and of the law enforcement agency's determination to seek out and to apprehend drunk drivers. The primary purpose should *not* be to enforce drunk driving laws or to discover and punish drunk drivers.<sup>22</sup>

Next, law enforcement officials should decide on a location for the roadblock. In *Sitz*, the state police selected a checkpoint location according to the following directives:

- (1) The site selected shall have a safe area for stopping a driver and must afford oncoming traffic sufficient sight distance for the driver to safely come to a stop upon approaching the checkpoint.
- (2) The location must ensure minimum inconvenience for the driver and facilitate the safe stopping of traffic in one direction.
- (3) Roadway choice must ensure that sufficient adjoining space is available to pull the vehicle off the travelled portion of the roadway for further inquiry if necessary.<sup>23</sup>

To follow the example set in *Sitz*, law enforcement officials should choose checkpoint sites in a managerial fashion. Field officers may offer input, but should not select the sites themselves. Moreover, the guidelines should ensure that the chosen location actually does advance the government's interest in deterring and detecting drunk driving. If an accused later attempts to challenge the government's site selection, the prosecutor can convince a court that the location was chosen properly by showing that law enforcement officials based their decision on arrest statistics or accident data. Notably, an Oklahoma appeals court *disallowed* a roadblock when it found that, "in establishing the sites for the roadblocks, [law enforcement] officers did not even consult statistics available regarding high traffic areas."<sup>24</sup> The government must be able to demonstrate a rational basis for its choice of the location, as well as its concerns for public safety and its efforts to minimize inconvenience to motorists.

A law enforcement agency should set down in writing the purpose of its roadblock program, the factors to be considered in choosing a location, and explicit instructions on conducting the roadblock. Moreover, it should disseminate this information to its field officers before it allows them to embark on any roadblock detail. The Michigan State Police published its roadblock guidelines in a sixteen-page booklet. This booklet not only lists purposes, goals, and procedures, but also includes detailed diagrams for setting up roadblocks and a list of necessary equipment.<sup>25</sup> Moreover, the state police briefed field officers before they set up the checkpoint and debriefed them immediately after the roadblock operation ended. That the state police department in *Sitz* reduced its roadblock procedures to writing, explained them to its field officers, and ensured that the field officers followed them was critically important. As *Sitz* revealed, the discretion of field officers to stop cars at the roadblock should be kept to a minimum.<sup>26</sup>

Courts tend to find problems with roadblocks that law enforcement agencies conduct without the limitations of detailed guidelines. In *State v. Jones* the Florida Supreme Court denied the admissibility of evidence obtained in a roadblock search, stating that "a written set of uniform guidelines must be issued before a roadblock can be utilized to apprehend motorists driving under the influence of alcohol, covering in detail procedures which field officers are to follow in the roadblock."<sup>27</sup> Appellate courts in Nebraska,<sup>28</sup> New Jersey,<sup>29</sup> and Pennsylvania<sup>30</sup> likewise have excluded evidence seized at roadblocks when the "degree of discretion vested in the field officers rendered the [roadblock] procedures constitutionally infirm."<sup>31</sup>

Law enforcement officials also should staff the roadblock properly. The Michigan guidelines approved by the Supreme Court identify six different duty positions at a roadblock.

One key actor is the "officer in charge." Preferably a high-ranking law enforcement agent, the officer in charge may shut down the roadblock operation if weather or traffic conditions create safety hazards.

Another participant, the "approach safety officer," should be stationed along the shoulder. As drivers

<sup>22</sup>See, e.g., *State ex rel. Ekstrom v. Justice Court*, 663 P.2d 992 (Ariz. 1983).

<sup>23</sup>Michigan Dep't of State Police, *Sobriety Checkpoint Guidelines for Law Enforcement Agencies* (July 1990) (used with permission of Lieutenant Al Slaughter, Michigan State Police).

<sup>24</sup>*State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984).

<sup>25</sup>See Appendix A, B.

<sup>26</sup>*Sitz*, 110 S. Ct. at 2487; see also *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

<sup>27</sup>483 So. 2d 433 (Fla. 1986).

<sup>28</sup>*State v. Crom*, 383 N.W.2d 461 (Neb. 1986).

<sup>29</sup>*State v. Kirk*, 493 A.2d 1271 (N.J. Super. Ct. App. Div. 1985).

<sup>30</sup>*Commonwealth v. Leninsky*, 519 A.2d 984 (Pa. Super. Ct. 1986).

<sup>31</sup>*Id.* at 993.

approach the checkpoint, he or she should watch them for potentially hazardous behavior, such as obvious drunken or reckless driving, and should warn the roadblock officers of these dangers. Under no circumstances should the approach safety officer leave his or her post.

If sufficient personnel are available, the roadblock team should deploy an "observation officer" to watch all traffic entering and leaving the checkpoint. This officer should concentrate on drivers that avoid the checkpoint, scrutinizing their conduct for signs of intoxication. The officer would pursue an evasive vehicle only after reporting his or her observations to the officer in charge and receiving instructions to apprehend the driver.

The team also should appoint a "data collection officer" to record information on the numbers of drivers entering the checkpoint, drivers detained by police, and drivers actually arrested. He or she also would time the delays resulting from the stoppages.

A "lane safety officer" should ensure that the flares and lights leading up to the checkpoint remain lit and that all road cones are in place. He or she should be alert for any safety hazards that may develop.

Finally, the most important actors in a roadblock operation are the "checkpoint contact officers"—the agents that actually stop the cars and examine the drivers. Most roadblocks probably would stand or fall based on their conduct. Contact officers should be highly experienced in identifying drunk drivers because they must decide which drivers will be detained for further investigation and which must be arrested for DUI. They should be highly visible, wearing reflective vests and conspicuous police insignia, and should carry flashlights. As each automobile is stopped, the officer should identify himself or herself and should explain the reason for the stop. If the officer observes no indications of intoxication, he or she should direct the driver to proceed.<sup>32</sup> On the other hand, if the officer does detect some sign that the driver may be intoxicated, he or she should direct the driver to a safe area off the travelled roadway. There, the same officer should examine the driver more closely, using field sobriety tests and preliminary breath tests. If the driver is intoxicated, he or she should be arrested. If not intoxicated, the driver should be told to proceed.

All officers must follow the guidelines consistently. In *Delaware v. Prouse*, the Supreme Court indicated that a

checkpoint operation may be constitutionally sound even if police stop only one car in ten if the officers stopped the cars pursuant to a predetermined system and *not* as the result of unfettered exercises of discretion.<sup>33</sup> State courts also have allowed pattern stops under these circumstances.<sup>34</sup>

One final consideration for law enforcement officials is how the government should publicize the roadblock. Courts are more likely to allow a roadblock that the government sets up to deter drunk drivers and preemptive publicity is crucial to proving that purpose. Indeed, several state courts that struck down convictions stemming from roadblock stops emphasized the roles that prior publicity played in their decisions. In *State ex rel. Ekstrom v. Justice Court*, the Arizona Supreme Court attributed much of the general fear experienced by affected motorists—a factor that ultimately tipped the scales against the Government—to the government's failure to publicize its roadblock before setting it up.<sup>35</sup> Similarly, in *Commonwealth v. McGeoghegan*, the Massachusetts Supreme Court found that "[a]dvance publication of the date of the intended roadblock, even without announcing its precise location, would have the virtue of reducing surprise, fear and inconvenience. [Accordingly, this] ... procedure may achieve a degree of law enforcement and highway safety that is not reasonably attainable by less intrusive means."<sup>36</sup> Apparently, an announcement that a roadblock to detect drunk drivers will be set up at some time on a certain day or group of days will suffice. The courts perceive that this announcement will help to discourage drunk driving, will lessen the anxieties of affected motorists, and will create a safer, less intrusive checkpoint for everyone involved. A good roadblock program will reflect all of these objectives.

### The Role of the Prosecutor

The prosecutor or trial counsel is a key figure in any roadblock case. His or her first contribution should be to help to develop the procedures discussed above, working closely with law enforcement officials to create a constitutionally healthy plan. Additionally, when a roadblock results in an apprehension, the prosecutor should review the procedures with the participating officers before going into court to ensure that the officers are familiar with the procedures and that they actually followed them. Moreover, because the Government must prove that written procedures existed and were disseminated to field

<sup>32</sup>In Michigan, contact officers also gave each driver a pamphlet explaining in further detail the workings of the roadblock. A motorist could record his or her comments about the roadblock on a questionnaire card attached to the booklet and mail it in to the state.

<sup>33</sup>440 U.S. at 664.

<sup>34</sup>*State v. Coccoma*, 427 A.2d 131 (N.J. Super. Ct. App. Div. 1980) (holding that stopping every fifth car was proper).

<sup>35</sup>663 P.2d 992 (Ariz. 1983).

<sup>36</sup>*Commonwealth v. McGeoghegan*, 449 N.E.2d 349, 353 (Mass. 1983).

officers before the roadblock was set up, the prosecutor should call witnesses to establish this. The Government apparently need not identify the actual written procedures in court and the prosecutor should not volunteer to do so. To bring the written procedures into court invites the defense counsel to review them in detail with each witness. This questioning probably would reveal minor deviations from the departmental standard that could give a skilled defense counsel an opening to argue that field officers failed to follow essential procedures.

Although *Sitz*<sup>37</sup> allows law enforcement agents to perform roadblock searches, a roadblock search typically is conducted without the sanction of a warrant. Accordingly, the Government must prove that field officers performed a roadblock search lawfully under a recognized exception to the Fourth Amendment warrant requirement.<sup>38</sup> The prosecutor should be prepared to offer evidence or testimony about all the following matters:

(1) the manner in which law enforcement officials selected the roadblock site and the data that was available to them about the site before they established the roadblock;<sup>39</sup>

(2) how the law enforcement agency conveyed its written roadblock procedures to the participating field officers;<sup>40</sup>

(3) the purpose of the roadblock;<sup>41</sup>

(4) the "compelling state interest" that justified the roadblock;<sup>42</sup>

(5) how the law enforcement agency publicized the roadblock before setting it up;<sup>43</sup>

(6) the data the agency collected about the roadblock operation, such as the number of vehicles that officers stopped, the number of arrests, and the average length of each stop;<sup>44</sup>

(7) confirmation that field officers applied the written procedures consistently to all vehicles;<sup>45</sup> and

(8) the steps that the law enforcement agency took to minimize the intrusion on motorists' pri-

vacy and to maximize the safety of all individuals involved.<sup>46</sup>

If a prosecutor fails to offer evidence on any of these points, the defense counsel could argue that the Government failed to prove that point and might succeed in distinguishing *Sitz*.

At trial, the prosecutor must counsel police officers to answer all questions honestly, including the defense counsel's questions about the purpose of the roadblock. Neither a judge, nor a jury, looks kindly on a police officer who comes across as dishonest or sneaky. Attempting to present a sobriety roadblock to the court as a driver's license and registration check<sup>47</sup> or a safety check<sup>48</sup> not only will ruin the officer's credibility, but also may cause the court to suppress the Government's evidence.

Finally, prosecutors should take care to prove that the person arrested for driving under the influence actually did appear to be under the influence of intoxicants. The roadblock is a proper tool for stopping motorists for a brief examination. Once a police officer has determined that a driver is exhibiting signs of intoxication, however, and has referred him or her to a secondary checkpoint, the evidentiary basis for further investigation should be the same as in any other DUI case. As the Court pointed out in *Sitz*, "the detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard."<sup>49</sup>

### A Defense Perspective

*Sitz* clearly establishes the validity of roadblock checkpoints. Moreover, the Supreme Court has held in other decisions that the "operation of fixed checkpoints need not be authorized in advance by a warrant."<sup>50</sup> A defense counsel, however, need not run up the white flag when confronted with evidence obtained at a roadblock stop. Indeed, the absence of a warrant requirement actually may work to the defendant's advantage. When a warrant has been issued in a particular case, a reviewing court normally will uphold the warrant, absent an abnormal abuse of discretion or a mistake of monumental propor-

<sup>37</sup> *Sitz*, 110 S. Ct. at 2481.

<sup>38</sup> See *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

<sup>39</sup> *Sitz*, 110 S. Ct. at 2484.

<sup>40</sup> *Id.*

<sup>41</sup> See *Ekstrom*, 663 P.2d at 994.

<sup>42</sup> *Martinez-Fuerte*, 428 U.S. at 555.

<sup>43</sup> *State v. Muzik*, 379 N.E.2d 599 (Minn. App. 1985).

<sup>44</sup> *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984).

<sup>45</sup> *State v. Crom*, 383 N.W.2d 461 (Neb. 1986).

<sup>46</sup> *Commonwealth v. Leninsky*, 519 A.2d 984 (Pa. Super. Ct. 1986).

<sup>47</sup> *Ekstrom*, 663 P.2d at 995.

<sup>48</sup> *Muzik*, 379 N.W.2d at 603.

<sup>49</sup> *Sitz*, 110 S. Ct. at 2485.

<sup>50</sup> *Camara v. Municipal Court*, 387 U.S. 523 (1967).

tions. The combination of postdetention judicial reviews mentioned in *Sitz*<sup>51</sup> and the burden of proof borne by the Government puts a defense counsel on a firm footing as he or she begins a roadblock case.

The first thing defense counsel should do in a motion to suppress evidence in a roadblock case is very simple. He or she either should ask the Government to stipulate that the evidence was obtained in a warrantless search or should call the arresting officer and ask one question: "Did you stop and investigate my client without a warrant to do so?" In either case, the defense demonstrates the absence of a warrant and the burden shifts to the Government to justify the warrantless stop.

Bearing in mind the limited scope of *Michigan v. Sitz*,<sup>52</sup> a defense counsel should determine whether the instant case is factually distinguishable. The first area the defense attorney should investigate is the purpose of the roadblock. As mentioned above, courts commonly allow roadblocks that are designed to deter drunk driving, but are not so tolerant when a roadblock's main purpose is to snare drunk drivers and to produce evidence for their arrests and prosecutions.<sup>53</sup> Nor are courts likely to sanction roadblocks set up under the false pretext of safety or license checks. A defense counsel can approach the arresting officers in one of two ways. He or she could ask each officer to describe the purpose of the roadblock operation. If the prosecutor has failed to brief the officers properly, one or more of them may testify that the operation's sole purpose was to arrest drunk drivers, rather than to deter them. Alternatively, the defense counsel could ask the witnesses directly, "This roadblock was set up to detect drunk drivers, was it not?" Although a "yes" answer would be acceptable, some officers, feeling that a nobler answer is called for, may offer the safety review or license check as the reason for the checkpoint. Taken alone, this *faux pas* may not defeat the Government, but combined with other discrepancies it could result in the exclusion of the evidence.

The defense attorney also should concentrate on the procedures and guidelines of the police department that conducted the checkpoint. As mentioned above, the prosecutor must establish that these guidelines exist and that the police actually followed them. The defense counsel's best weapon to disprove these lines of testimony may be a copy of the regulations themselves. He or she should ask the officer testifying about these rules to produce a copy. A prosecutor will be hard pressed to convince the court of the irrelevancy of the very item that he or she is trying to prove exists. Armed with the guidelines, a

defense counsel can demonstrate through cross-examination of a poorly prepared witness that the officers conducting the roadblock either did not know the rules or willfully failed to follow them. Evidence of either will give credence to the argument that the field officers exercised a fair amount of discretion in enforcing the roadblock. The more discretion the officers had, the less likely the court is to find the roadblock constitutional.<sup>54</sup>

If the police at the roadblock stopped every car, defense counsel will be hard pressed to prove that they stopped his or her client at random. If traffic was sufficiently heavy, however, the police occasionally may have had to relieve congestion by allowing a series of drivers to pass through unchecked. If so, the defense can argue that the accused was the target of a random stop. The Supreme Court expressed its disapproval of random stops in *Delaware v. Prouse*, condemning them as "standardless and unconstrained discretion" and "the [kind of] evil the court ... discerned when in previous cases it ... insisted that the discretion of the official in the field be circumscribed ...."<sup>55</sup>

Finally, the defense counsel should concentrate on the specific indicia that caused the police to single out the accused from all the other drivers passing through the roadblock. Defense counsel should remember that *Sitz* merely provides the police with a vehicle for stopping drivers without probable cause. As Chief Justice Rehnquist commented, "It is important to recognize what our inquiry is *not* about. No allegations are before us of unreasonable treatment of any person after an actual detention at a particular checkpoint."<sup>56</sup> Accordingly, the defense attorney should ask the detaining officer what experience he or she has in detecting drunken drivers and what "articulable facts" led him or her to zero in on one particular driver—the accused. The officer's own previous testimony about the speed with which the police moved the traffic along may call into question the officer's ability to assess a driver's level of intoxication.

Overall, the defense counsel must remember that the Government bears the burden of going forward in most of these areas. The defense generally need not attempt to refute any matter that the prosecutor neglected to raise.

### Conclusion

The Supreme Court has laid to rest any doubts about the constitutionality of DUI roadblock stops. Little doubt exists, however, that police conduct that does not adhere to the standards set down in *Michigan v. Sitz* will not be tolerated.

<sup>51</sup> *Sitz*, 110 S. Ct. at 2485.

<sup>52</sup> *Id.*

<sup>53</sup> *Ekstrom*, 663 P.2d at 992.

<sup>54</sup> *State v. Jones*, 483 So. 2d 433 (Fla. 1986).

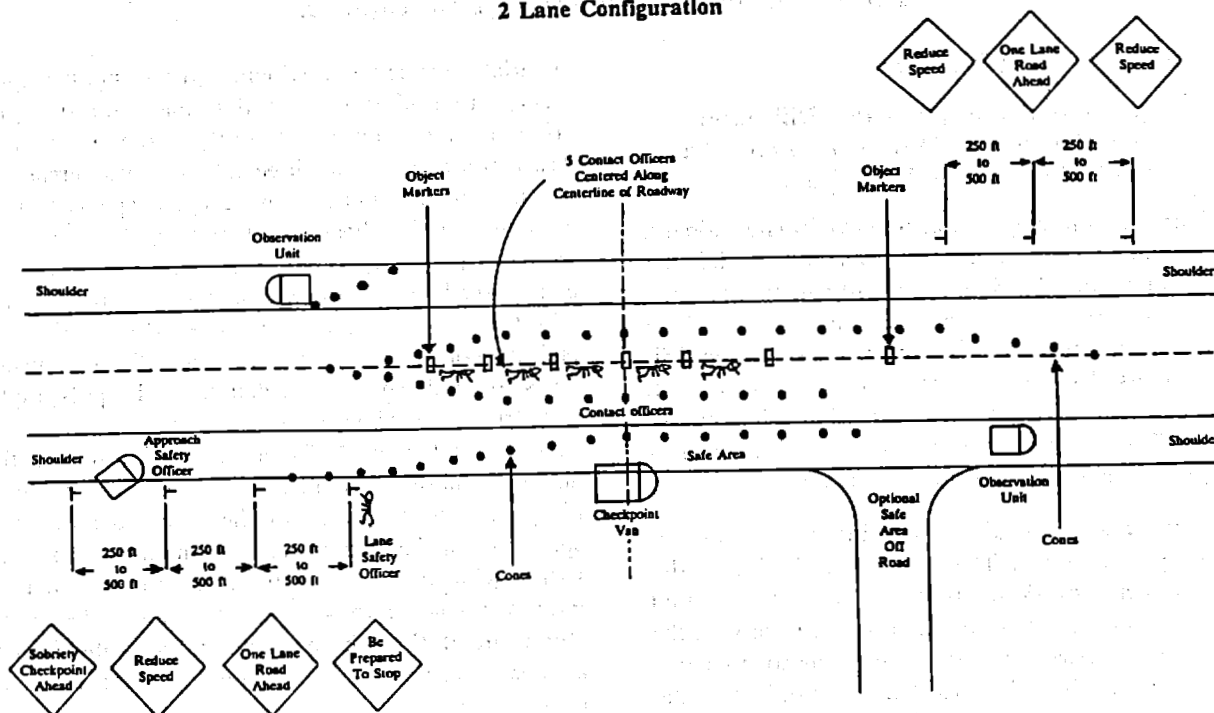
<sup>55</sup> *Prouse*, 440 U.S. at 661.

<sup>56</sup> *Sitz*, 110 S. Ct. at 2485 (emphasis added).

## Appendix A

### Sobriety Checkpoint

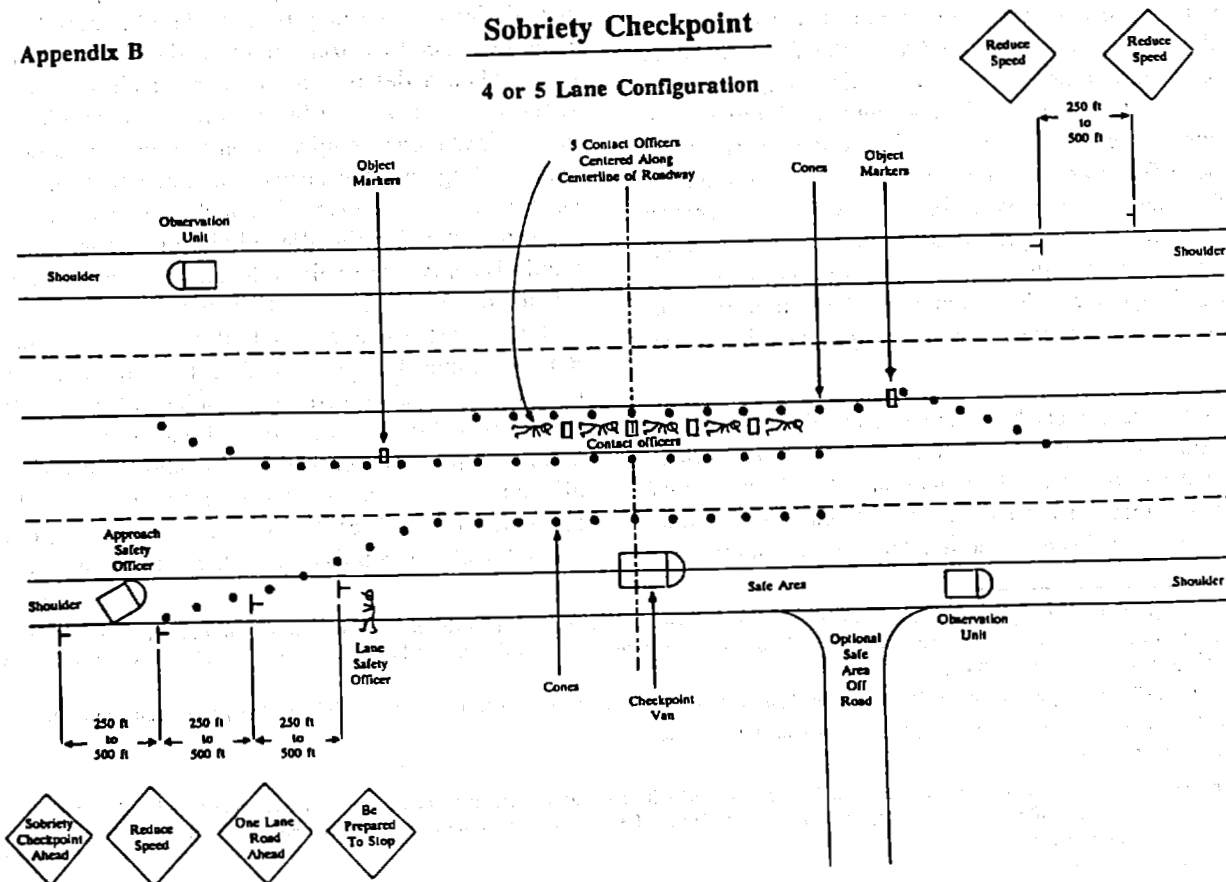
#### 2 Lane Configuration



## Appendix B

### Sobriety Checkpoint

#### 4 or 5 Lane Configuration



# USALSA Report

United States Army Legal Services Agency

## The Advocate for Military Defense Counsel

### DAD Notes

#### Discovery, Due Process, and Due Diligence: The Process That Is Due May Depend on What the Defense Counsel Has Done

Consider the following scenario. Two female trainees, Private *B* and Private *E*, testify at a court-martial that they got drunk and passed out at a drill sergeant's apartment. They claim that the drill sergeant and his friend then had sex with them without their consents. The drill sergeant admits that the trainees were in his apartment, but claims that he did not engage in sexual intercourse with them. The drill sergeant is convicted of raping Private *B* and of indecently assaulting Private *E*.

Before the court-martial, both trainees were administered polygraph tests. The results implied that the trainees were not speaking truthfully when they stated that they had not consented to sexual intercourse with the drill sergeant. The trial defense counsel discovered this before trial. What he failed to discover until after the trial, however, was a statement Private *B* had made to the polygrapher after the test. Specifically, she stated that she did not feel she was a victim of rape because she had enjoyed sex with appellant and that she felt she could have done something to prevent the drill sergeant from having sex with her if she had wanted to. Although the trial counsel also was ignorant of this statement before trial, the defense counsel claims in his posttrial submissions that the appellant was denied due process because the Government never provided the defense with a copy of the polygraph results, nor did it inform the defense of the alleged rape victim's statement to the polygrapher, in response to the defense counsel's general discovery request.

These were the facts behind the recent decision of the Army Court of Military Review in *United States v. Simmons*.<sup>1</sup> Citing *Brady v. Maryland*<sup>2</sup> and *Giglio v. United States*,<sup>3</sup> the accused argued on appeal that the Government's failure to disclose the existence of favorable and

material impeachment evidence (the postpolygraph statement) violated the accused's due process rights. In affirming the findings of guilty and the sentence, the Army court arrived at three rather controversial conclusions. First, it found that the alleged rape victim did not deny that she had been raped, stating, "We interpret Private *B*'s post-polygraph statements not as a denial of being raped, but as the victim's explanation concerning why the polygraph may have showed deception."<sup>4</sup> Second, the court held that because the defense counsel "did not seek to delve into the details of the polygraph until after trial," he failed to exercise "due diligence" to discover the statements.<sup>5</sup> The court added, however, that the defense counsel's failure to exercise "due diligence" in his pretrial investigation of the case did not "raise the spectre of inadequate representation as his action is consistent with his tactics at trial, i.e., to show that sexual intercourse never took place."<sup>6</sup> Finally, the court was "convinced that there is no reasonable doubt that appellant would have been convicted had the evidence been disclosed."<sup>7</sup>

The Army court's conclusions sharply narrowed the boundaries of what may be considered material impeachment evidence that *Brady* requires the Government to disclose when a defense counsel has made only a general request for discovery.<sup>8</sup> In reaching these conclusions, the court placed great emphasis on the accused's defense at trial. Noting that the accused claimed that sexual intercourse never took place, it concluded that impeachment evidence attacking the alleged victim's nonconsent to sex would be only marginally relevant. The court's bare conclusions, however, failed to recognize that trial tactics and defenses are a product of the information that a defense counsel receives before trial about the offense charged. Had the Government disclosed Private *B*'s statements, or had the defense counsel been diligent enough to obtain them, the defense hardly would have ignored significant impeachment evidence that related directly to an element of proof of the offense. Knowledge of the alleged victim's admission to the polygrapher probably

<sup>1</sup>33 M.J. 883 (A.C.M.R. 1991). In *Simmons* a defense counsel asked the Government to disclose "any and all information in the Government's possession or in the possession of government agents, informants, or police officials that might be favorable to the defense within the meaning of *Brady v. Maryland*." *Id.* at 885 (citation omitted).

<sup>2</sup>427 U.S. 97 (1976) (the Government's failure to disclose material evidence favorable to the accused violates due process guarantees).

<sup>3</sup>405 U.S. 150 (1972) (*Brady* rule encompasses impeachment evidence).

<sup>4</sup>*Simmons*, 33 M.J. at 886.

<sup>5</sup>*Id.* Federal courts have held that evidence that could be discovered with any reasonable diligence need not be disclosed under *Brady*. See *Jarrell v. Balkcom*, 735 F.2d 1242, 1258 (11th Cir. 1984), cert. denied, 471 U.S. 1103 (1985); *United States v. Campagnuolo*, 592 F.2d 852, 861 (5th Cir. 1979).

<sup>6</sup>*Simmons*, 33 M.J. at 886 n.3.

<sup>7</sup>*Id.* at 886.

<sup>8</sup>*Cf. Carter v. Rafferty*, 826 F.2d 1299 (3d Cir. 1987) (holding undisclosed oral reports of the polygraph examination conducted on key government witness that had an impact on his credibility to be "material" under *Brady*).

would have made even the dullest defense attorney reconsider the feasibility of defending the accused solely on the theory that sexual intercourse never occurred. Under these circumstances, the Army court's determination that the defense counsel failed to exercise "due diligence" to obtain Private B's statements actually would seem to "raise the spectre of inadequate representation," regardless of the defense counsel's choice of tactics at trial.

Moreover, whether one interprets Private B's remark that she did not feel she was a victim of rape as a denial of being raped or as an explanation of why the polygraph may have shown deception—which appears to be a distinction without a difference if one is considering the remark for its impeachment value—this statement directly contradicts Private B's testimony at trial that she thought she was raped. Private B's testimony was critical to the Government's case on the rape charge and her credibility had to be a crucial issue for the court members. With no basis other than speculation to determine how Private B's statements would have affected the defense counsel's trial tactics or how Private B would have responded to cross-examination regarding her inconsistent statements, the Army court's assertion that "there is no reasonable doubt" that the accused would have been convicted had the evidence been disclosed seems somewhat shortsighted.

Nevertheless, this case places trial defense counsel on notice that general discovery requests for favorable evidence may not be sufficient to obtain all material evidence pertaining to the trial. Counsel must investigate diligently all leads relating to the government's evidence and must attempt to obtain directly all the information that has been made available for review. Captain Boyd.

#### **Disciplining Children Without Getting Slapped With a Court-Martial**

The question of whether a parent has used excessive force to discipline a child often proves to be quite sensitive and troubling. In the "old days" when parents, lawyers, and judges were young, the use of a belt, paddle, or hickory switch to spank a child was not uncommon. Most of us, however, recognize that what once may have been a typical punishment for a child's wrongdoing now may lead to scorn within the community or even to court-martial. Nevertheless, a recent decision of the Army

Court of Military Review indicates that a parent still may use reasonable and moderate force—which may include grandad's old leather belt—to discipline his or her child, as long as the parent's motive in disciplining the child is proper.

In *United States v. Scofield*,<sup>9</sup> the Army court scrutinized the appellant's conduct in light of Model Penal Code standards concerning parental discipline and concluded that the appellant had acted for proper purposes and had used a moderate and reasonable degree of force.<sup>10</sup> Consequently, the conviction and discharge of a soldier with over eighteen years of service was reversed.

The Model Penal Code employs a two-prong test for examining parental discipline. The Code states that the use of force by parents is justifiable if:

(a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his [or her] misconduct; and

(b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation ....<sup>11</sup>

If both prongs of the Model Code are satisfied, the so-called proper parental discipline defense should shield a parent from charges of battery without subjecting the child to the risk of an improper and excessive use of force.<sup>12</sup>

In *Scofield*, the appellant pleaded guilty to using excessive force when he punished his eight-year-old son and six-year-old daughter by spanking each of them between five and ten times on the buttocks and backs of their legs with a leather belt. During the providence inquiry, however, appellant revealed that he had spanked the children only after all other attempts to correct their misbehaviors had failed. The appellant stated that his son repeatedly came home late from school and that "[a]fter speaking with him about it and trying to influence his behavior through various punitive measures like going to bed early [and] withdrawal of privileges, [the appellant had] felt that [he] had to [spank his son] ... to get him to understand that he should comply ...."<sup>13</sup>

<sup>9</sup>33 M.J. 857 (A.C.M.R. 1991).

<sup>10</sup>The Court of Military Appeals made the Model Penal Code's provisions on child discipline applicable to the military in *United States v. Brown*, 26 M.J. 148 (C.M.A. 1988).

<sup>11</sup>Model Penal Code § 3.08(1) (Proposed Official Draft 1962).

<sup>12</sup>*Scofield*, 33 M.J. at 860 (citing R. Perkins & R. Boyce, *Criminal Law* (3d ed. 1969); *Campbell v. Commonwealth*, 405 S.E.2d 1 (Va. App. 1991) (parents may discipline children within bounds of moderation and reason); *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648 (1971) (parent may spank child who misbehaved without being liable for battery)).

<sup>13</sup>*Id.* at 861.

Similarly, the appellant's daughter had stolen earrings from her babysitter and, as an alternative to punishment, the appellant had given his daughter two days to return the earrings. After the two days passed, however, she had failed to return the earrings and displayed little concern about the situation. Consequently, the appellant testified that he then

sat her down and discussed with her why [he] was going to spank her; because she had stolen something and lied to [him] about the intent and circumstances surrounding the theft of the earrings. [The appellant] wasn't angry with her; [he] was disappointed with her behavior, or angry with her behavior. So [appellant] decided at that time that spanking her was a reasonable punishment for stealing and lying.<sup>14</sup>

Because the appellant indicated that he had spanked his children with a belt only after other disciplinary means had failed, that he had done so only out of parental concern, and that he did not harbor a malicious desire to inflict pain upon his children, the Army court held that the appellant's motive in spanking them was proper.<sup>15</sup> The court, however, noted that a parent's motive in disciplining a child is clearly a question of fact, pointing out that, if evidence in a future case reveals an accused's general dislike of his or her child or demonstrates that he or she punished the child during a fit of anger or immediately after the child's misbehavior, the court well might arrive at a different conclusion than it reached in *Scofield*.<sup>16</sup> If the court finds an improper motive, it could conclude that the punishment violates the Model Penal Code provisions and could find that the parent's claim of a disciplinary intent does not provide a defense for the accused's actions.

Even if the court finds a "proper" motive for a disciplinarian's actions, the defense will fail if the force used was excessive.<sup>17</sup> The *Scofield* court recognized that the drafters of the Model Penal Code intended to protect a properly motivated disciplinarian unless he or she "culpably creates substantial risk of the excessive injuries ..." specified [in the second prong of the test].<sup>18</sup> The court, however, noted that

under some circumstances, a parent who acts with a bona fide parental purpose may lawfully punish his or her child for misconduct by striking him or her on the buttocks and back of his or her legs with a belt with sufficient force that welts and bruising are an unintended result.<sup>19</sup>

Although the appellant stated that he regretted the force he used in disciplining his children and admitted that, in hindsight, he believed that his use of force had been excessive, the court held that the evidence of record did not support that conclusion as a matter of law.<sup>20</sup> Rather, the court relied on a pediatrician's testimony that the injuries to the appellant's daughter could not be categorized unequivocally as serious despite her "fairly extensive" bruising.<sup>21</sup> Moreover, based on its own review of the photographic evidence of injuries, the court was unwilling to hold that the photographs satisfied the "extreme force" or "extensive injury" standards of the Model Penal Code.<sup>22</sup>

The *Scofield* decision should place both trial and defense counsel on notice of the available defenses to alleged excesses in parental discipline and the importance of medical testimony concerning the extent of a child's injuries. Advising your client to plead guilty to charges of assault consummated by battery under facts similar to those in *Scofield* might invite a spanking by the appellate courts. Captain Carey.

#### Article 134 Catches Some Misconduct, Not All of It

The Army Court of Military Review recently reaffirmed the old military legal axiom that article 134 of the Uniform Code of Justice (UCMJ) is not a "catchall" as to make every irregular, mischievous, or improper act, a court-martial offense.<sup>23</sup> The requirement in UCMJ article 134 for a "direct and palpable" prejudice to good order and discipline means that conduct "must be easily recognizable as criminal, must have a direct and immediate adverse impact on discipline, and must be judged in the context surrounding the acts."<sup>24</sup>

The case in which the Army court recently reaffirmed this axiom involved a male staff sergeant who photographed a female lieutenant in the nude during their sexual affair.<sup>25</sup> They later ended their affair and the

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* at 860 (discussing *United States v. Brown*, 26 M.J. 148 (C.M.A. 1988), in which the Court of Military Appeals found that sufficient evidence existed to show an improper motive for discipline because the parent disliked the child, was venting his hostility, and was generally angry on the day in question).

<sup>17</sup>*Id.* at 861-62.

<sup>18</sup>*Id.* at 861 (quoting Model Penal Code § 3.08(1) commentary at 139 (1985)).

<sup>19</sup>*Id.* at 862 (citing *State v. DeLeon*, 813 P.2d 1382 (Haw. 1991)). No protection will exist for an improperly motivated parent who inflicts similar welts and bruises. See *Brown*, 26 M.J. at 150-51.

<sup>20</sup>*Scofield*, 33 M.J. at 863.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>*United States v. Sadinsky*, 34 C.M.R. 343 (C.M.A. 1964).

<sup>24</sup>*United States v. Henderson*, 32 M.J. 941 (N.M.C.M.R. 1991).

<sup>25</sup>*United States v. Warnock*, CM 8900191, 1991 WL 285750 (A.C.M.R. 31 Dec. 1991).

lieutenant began another affair with a private first class. The staff sergeant, however, kept the negatives of the nude photographs and he later showed them to the private and bragged about his "accomplishment." This was the conduct the Government charged as "wrongful."

At the staff sergeant's court-martial, the private testified that he had not been offended when the staff sergeant showed him the negatives of his lover in the nude. The private added that he had regarded his own relationship with the lieutenant as purely sexual, rather than romantic or social. The most effective evidence the Government could offer to establish prejudice to good order and discipline was the testimony on cross-examination of a first sergeant, who "guess[ed]" that the accused's conduct "would [tend to] ... discredit [the accused's] leadership within the unit ...."<sup>26</sup>

The Army court identified two theories upon which the Government might have predicated prejudice to good order and discipline: "first, diminished respect for [the lieutenant as an officer], and second, diminished respect for the appellant as a noncommissioned officer."<sup>27</sup> The court, however, found that prejudice to good order and discipline could not be predicated on diminished respect for the officer because she already had destroyed her authority and entitlement to respect from both of her paramours.<sup>28</sup> The court also refused to find that the accused had diminished respect for himself. Dismissing the first sergeant's testimony on cross-examination as too speculative, the court held that no enlisted soldier other than the private could have "had diminished respect" for the accused, "because the [accused had] shown the negatives only to [the private]."<sup>29</sup> The court then noted that the private had testified that he was unaffected by the accused's conduct and stated that it could find "nothing in [his] testimony from which [it could] infer that his respect for the appellant was diminished."<sup>30</sup>

The procedural aspects of the case bound the court to conduct only a legal review.<sup>31</sup> Nevertheless, the court's

analysis clearly shows that the Government must prove a direct and palpable prejudice to good order and discipline. The Government may focus on either the victim or the accused, but the impact on good order and discipline must be proved. A defense counsel should keep this requirement in mind when he or she assesses the merits of the charge and again during the trial itself, to ensure the Government meets its burden. Captain Keable.

#### "Expert" Testimony in Child Abuse Cases— Commenting on Credibility

The Army Court of Military Review recently addressed two critical issues dealing with expert testimony in child abuse cases. In *United States v. King*,<sup>32</sup> the Army court held that a military judge did not err by permitting an expert witness to testify about the credibility of a child victim when the expert witness testified generally about the ability of children to fabricate, but never actually stated that the child victim himself was credible.<sup>33</sup> The court also held that the military judge did not err in allowing the Government's expert to testify both on the merits and during presentencing about matters that the appellate counsel maintained were beyond her expertise.<sup>34</sup> The Court of Military Appeals subsequently granted the accused's petition for grant of review and final briefs have been filed on behalf of both the accused and the Government.<sup>35</sup>

In *King*, the Government called Dr. Donna Sherrouse on the merits and again during presentencing as an expert in child abuse.<sup>36</sup> She testified that she owned the Montessori Children's House in the local community, had testified extensively as an expert in child abuse, had a doctorate in education with emphasis on learning disabilities, and had two master's degrees in education and school psychology. She specialized in diagnostic activities for children. On the strength of these credentials, she was qualified as an expert without defense objection, and testified as follows:

<sup>26</sup>*Id.*, 1991 WL 285750, at \*1.

<sup>27</sup>*Id.*, 1991 WL 285750, at \*2.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>The case was referred to the Army Court of Military Review under the provisions of UCMJ art. 69(d)(1). See Uniform Code of Military Justice art. 69(d)(1), 10 U.S.C. § 869(d)(1) (1988) [hereinafter UCMJ].

<sup>32</sup>32 M.J. 709 (A.C.M.R. 1991), *pet. for review granted*, 34 M.J. 23 (C.M.A. 1991).

<sup>33</sup>*Id.* at 713.

<sup>34</sup>*Id.*

<sup>35</sup>*United States v. King*, 34 M.J. 23 (C.M.A. 1991). The Court of Military Appeals granted review to consider the following issues:

I  
WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN ALLOWING, OVER DEFENSE OBJECTION, EXPERT TESTIMONY CONCERNING THE CREDIBILITY OF THE CHILD VICTIM.

II  
WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN ALLOWING AN EXPERT WITNESS TO TESTIFY INVOLVING MATTERS BEYOND HER EXPERTISE.

*Id.*

<sup>36</sup>*King*, 32 M.J. at 713 (A.C.M.R. 1991).

Q: Ma'am, what does the—literature in your profession suggest about whether children of the age five are capable of fabricating any or all of this?

A: Basically, the literature—

CDC: I object to that, Your Honor. Opinion as to whether or not the witness is being truthful, that's a question for the jury.

TC: Your Honor, we're speaking in general terms of whether the witness—whether the literature suggests a propensity for general witnesses making this up and this—in this age group of five.

MJ: The objection is overruled. You may proceed.

Q: Ma'am, again, do five year olds make this up?

A: No, they do not. They lack the sophistication to describe, anatomically correct [sic], the parts of the body; they have had no experience, we hope, with issues such as ejaculation; they would not know about the issues surrounding sexual activity unless they had been involved in a concrete way. So they don't have abstract ability that it would take to make up a story and then also make up events to match it. If I can use an example, a child could not say, he hurted [sic] my tail, which is a real common outcry with a child, and then, four hour [sic] later or six hours later, scream when you put them in the bathtub or cry when they use the bathroom because it burns when they urinate. They don't have the ability to match those two things and say, a ha, I've got to pull this story together. See, they just can't do that.

Q: At what age do children normally form that opinion—or, that ability?

A: You—again, the literature would say you'd have to have at least a twelve year old intellectual level to begin to abstract out and think through and pull a story together that was that fanciful and understand that you've got to have physical characteristics that match activities. It would just—you could have a teenager lie about this because they [sic] were angry about curfews or—hated the stepfather, but not a five year old.

TC: Nothing further, Your Honor.

During presentencing, Dr. Sherrouse testified that the appellant was a regressive pedophile. She then described the typical behavioral patterns of regressive pedophiles, stating that they were highly likely to continue to abuse children.<sup>37</sup>

The Court of Military Appeals has held consistently that child abuse experts may not render opinions about the credibility of victims or other witnesses.<sup>38</sup> The issue of a witness's credibility historically has been left to the jury, not to the expert witness.<sup>39</sup> In the instant case, the trial counsel asked Dr. Sherrouse whether five-year-olds make up incidents like the one alleged at trial. When she answered, "No, they do not," she essentially said, "I believe the child." Practically speaking, the current standard that the Court of Military Appeals has articulated for identifying permissible expert testimony is a distinction without a difference. It represents yet another deviation from the traditional rules of evidence in the well-intended, yet misguided, pursuit of alleged child abusers.<sup>40</sup> Trial defense counsel should object vehemently to expert testimony about the general credibility of child abuse victims—particularly now, pending the Court of Military Appeals' resolution of the *King* case.

Doctor Sherrouse also testified on sentencing that the accused is a "regressive pedophile." This testimony was extremely prejudicial, inflammatory, and factually unsubstantiated. The Army court conceded that Dr. Sherrouse's opinion testimony was related only minimally to her acknowledged expertise in child sexual abuse. Doctor Sherrouse never interviewed the accused, nor did she speak with anyone in his family, yet she still labeled him a pedophile in her testimony before the court-martial panel. Doctor Sherrouse's testimony clearly was more prejudicial than probative. Again, trial defense counsel must object to the qualifications of experts in child abuse cases, challenging the foundational bases for their testimonies under Military Rule of Evidence 702, and the probative—versus prejudicial—natures of their testimonies under Military Rule of Evidence 403. Captain Desmarais.

### **When Willful Disobedience Becomes Breaking Restriction: "I Order You Not to Violate My Order!"**

The following scenario is not uncommon for trial defense attorneys. Your client is charged with failure to

<sup>37</sup>*Id.* at 711.

<sup>38</sup>*See* United States v. Arruza, 26 M.J. 234 (C.M.A. 1988); United States v. Peterson, 24 M.J. 283 (C.M.A. 1987); United States v. Deland, 22 M.J. 70 (C.M.A. 1986), *cert. denied*, 107 S. Ct. 196 (1986); United States v. Cameron, 21 M.J. 59 (C.M.A. 1985).

<sup>39</sup>*See, e.g.,* United States v. Barnard, 490 F.2d 907 (9th Cir. 1973) ("Competency is for the judge, not the jury. Credibility, however, is for the jury—the jury is the lie detector in the courtroom.").

<sup>40</sup>*See, e.g.,* United States v. Tolppa, 25 M.J. 352 (C.M.A. 1987) (holding that an expert may testify about a child's ability to separate truth from fantasy or may discuss various patterns of consistency in stories of child sexual abuse victims and compare those patterns with patterns in the victim's story).

obey his commander's order. You discover that, because your client was experiencing severe domestic problems, his commander had moved him into the barracks and had restricted him to post until things cooled off. The trial counsel tells you that after the restriction was imposed, your client repeatedly expressed his desire to leave post to confront his spouse and that his exasperated commander then ordered him not to break the restriction. Sadly, despite this reminder, your client left the installation. He tells you, however, that he never intended to disobey his commander's order. Actually, he never went to his off-post quarters, but merely left post to get a hamburger at his favorite restaurant. Your client believes that his misconduct more accurately reflects a breach of restriction—not willful disobedience of his commander's order. What should you advise?

Your immediate task is to determine the ultimate offense that your client has committed.<sup>41</sup> You may consider various factors that will help you determine the ultimate offense. Chief among these are the commander's motivation in issuing the order and the level of defiance that marked the accused's violation of that order. In *United States v. Loos*,<sup>42</sup> the court, in dicta, established precedent for determining the command motivation to issue an order. The court stated that, by issuing an order, a superior officer "undeniabl[y]" can take the performance of a routine duty and "lift it above the common ruck."<sup>43</sup> The failure to perform that duty then could be punished as a failure to obey.

Despite this "undeniable" power, in *United States v. Quarles*,<sup>44</sup> the court proscribed the giving of an order simply to "escalate the punishment to which an accused otherwise would be subject for the ultimate offense involved." Subsequent decisions demonstrate the court's continued disapproval of the improper escalation of potential punishment.<sup>45</sup>

In addition to identifying the commander's motivation to order compliance with restriction, you must examine the facts and circumstances surrounding the disobedience of the order. In *United States v. Lattimore*,<sup>46</sup> the accused,

who then was restricted to the limits of the installation, approached his commander and asked that the restriction be lifted. When the commander discovered that the accused had broken restriction the previous day, he "re-emphasized" that the restriction remained in effect, "informed" the accused not to break restriction, and "told" the accused that the restriction would not be commuted at all.<sup>47</sup> The following day the accused broke restriction again when he went forty yards from the gate to talk with his girlfriend for a few minutes. The Army Board of Review found that the "requisite 'intentional defiance of authority'... was lacking under the circumstances" and held that the accused had violated UCMJ article 92, not article 90.<sup>48</sup> The court then held that the accused's misconduct was punishable merely as a breach of restriction because of the punishment limitations of footnote 5 to article 92.<sup>49</sup>

In *United States v. Caton*,<sup>50</sup> the Court of Military Appeals, summarily reversed an earlier decision of the Air Force Court of Military Review,<sup>51</sup> dismissing a charge of disobedience of a superior commissioned officer's order not to break restriction because the appellant also was charged with breach of restriction. The record revealed that, pursuant to nonjudicial punishment imposed under UCMJ article 15 in February 1986, Caton was restricted to post for a period of forty-five days. On 19 March 1986, Caton was spotted offpost and subsequently was ordered to meet with his commander. At this meeting, the commander advised Caton of his intent to impose additional nonjudicial punishment and gave Caton an "oral direction" not to depart the installation without permission as long as the restriction remained in effect.<sup>52</sup> Despite this express warning, Caton left the installation several hours later, and left again on the following day. The Air Force Court of Military Review determined that "it was clearly not error for the military judge to have concluded that, while the offenses would not be regarded as separately punishable, the more stringent Article 90, U.C.M.J., punishment would apply."<sup>53</sup> The Court of Military Appeals, however, disagreed with the lower court's conclusion, dismissing the article 90 offense after sum-

<sup>41</sup>"When the ultimate offense is found to be the underlying behavior as opposed to the willful disobedience of superior authority, the disobedience charge and specification are subject to dismissal." *United States v. Battle*, 27 M.J. 781, 783 (A.F.C.M.R. 1988) (citing *United States v. Peaches*, 25 M.J. 364 (C.M.A. 1987)).

<sup>42</sup>16 C.M.R. 52 (1954).

<sup>43</sup>*Id.* at 55.

<sup>44</sup>1 M.J. 231, 232 (C.M.A. 1975).

<sup>45</sup>See *United States v. Petterson*, 17 M.J. 69 (C.M.A. 1983); *United States v. Landwehr*, 18 M.J. 355 (C.M.A. 1984); cf. *Battle*, 27 M.J. at 786 (commenting on "the frustration inherent in attempting to determine the commander's motivation after the fact").

<sup>46</sup>17 C.M.R. 400 (A.B.R. 1954).

<sup>47</sup>*Id.* at 401.

<sup>48</sup>*Id.*; see also UCMJ art. 90.

<sup>49</sup>*Id.* at 403; see also *Petterson*, 17 M.J. at 72 (holding that when an accused's acts demonstrate "express defiance of the orders," the disobedience "constitutes 'the ultimate offense committed'").

<sup>50</sup>25 M.J. 223 (C.M.A. 1987).

<sup>51</sup>23 M.J. 691 (A.F.C.M.R. 1986), *rev'd*, 25 M.J. 223 (C.M.A. 1987).

<sup>52</sup>*Id.* at 692.

<sup>53</sup>*Id.* at 693.

marily finding it to be multiplicitious with the article 134 offense.

The most recent opinion of the Court of Military Appeals on this issue came three months after the *Caton* decision. In *United States v. Peaches*,<sup>54</sup> the accused, having been released from confinement to which he had been sentenced at an earlier court-martial, was handed a written order to report for duty the following morning. The accused did not report for duty as ordered. The court held that his failure to report for routine duties was not willful disobedience of an order, but was an offense that "has long been prosecuted under Article 86 or its predecessors."<sup>55</sup> The court found no "environment of defiance" attended the accused's misconduct, noting that the command had not ordered Peaches to repair as a "measured attempt to secure [his] compliance with a previously defied routine order."<sup>56</sup> The court's decision did not refer to the earlier *Caton* decision.

Despite judicial guidance provided by case law, at the heart of every restriction is an order effecting that restriction.<sup>57</sup> Accordingly, in every case not involving heedlessness or forgetfulness,<sup>58</sup> once a soldier goes beyond the geographical limits of the restriction, he or she willfully has violated an order. Even so, because the Court of Military Appeals has commented on the need to examine the presence or absence of defiance, as well as the motivation behind the follow-up order, the following hypothetical situation may merit discussion.

Assume that soldiers *A* and *B* are restricted to post. Upon receipt of this bad news, soldier *A* protests vociferously and states that he will leave post at the next opportunity. After the commander dismisses him, *A* conforms his actions to his words and immediately leaves post. Soldier *B*, on the other hand, salutes his commander, exits the office, and waits a few hours before he too leaves post. Who was more willful in his disobedience? Should a court recognize degrees of

willfulness? In reality, did not both soldiers merely break restriction?

Suppose the commander decides to meet with *A* again before *A* has a chance to leave post. The commander, remembering that he must avoid the appearance of escalating punishment improperly, explains the need to prevent the erosion of the command structure upon which the military organization is based<sup>59</sup> and orders *A* to comply with the restriction. If *A* and *B* both subsequently break restriction, *A* faces five years of confinement and a dishonorable discharge, but *B* may be confined for only a month.<sup>60</sup>

Trial defense counsel should seek to convince the trial counsel, the command, and—if need be—the military judge that despite the perceived environment of willful disobedience that surely must accompany every knowing and voluntary breach of restriction, the ultimate offense is nothing more than a breach of restriction and should be punished accordingly. Captain Turney.

### *Clerk of Court Notes*

#### **Court-Martial Processing Times: Cases Down, but Processing Time Increases**

The accompanying tables of general court-martial (GCM) and bad-conduct discharge special court-martial (BCDSPCM) processing times for fiscal year (FY) 1991 show that the number of cases decreased an aggregate of twenty-seven percent from the preceding year. Nevertheless, pretrial processing time averages increased by seven percent for GCM cases and by ten percent for BCDSPCM cases. Posttrial processing time averages increased by almost twenty percent.

The increased processing times cannot be blamed entirely on Operations Desert Shield and Desert Storm. Pretrial processing times for Army Central Command (ARCENT) and Third Army were lower than those of most other major commands. Army Central Command's posttrial processing times, however, were generally higher, particularly during redeployment.

<sup>54</sup>25 M.J. 364 (C.M.A. 1987).

<sup>55</sup>*Id.* at 366.

<sup>56</sup>*Id.*

<sup>57</sup>Early case law recognized this principle. See *Lattimore*, 17 M.J. at 403 ("restriction is generally imposed by the direct, personal order of an officer to an enlisted man"); *United States v. Porter*, 28 C.M.R. 448 (A.B.R. 1959).

<sup>58</sup>See UCMJ art. 90.

<sup>59</sup>*Petterson*, 17 M.J. at 72.

<sup>60</sup>Compare Manual for Courts-Martial, United States, 1984, Part IV, para. 14e(3) with *id.*, para. 102e.

### General Courts-Martial

	FY 1989	FY 1990	FY 1991
Records received by Clerk of Court	1554	1558	1114
Days from charges or restraint to sentence	44	43	46
Days from sentence to action	53	52	62
Days from action to dispatch	6	6	7
Days enroute to Clerk of Court	11	9	10

### BCD Special Courts-Martial

Records received by Clerk of Court	497	458	350
Days from charges or restraint to sentence	29	30	33
Days from sentence to action	45	45	53
Days from action to dispatch	4	5	6
Days enroute to Clerk of Court	9	9	9

### Non-BCD Special Courts-Martial

	FY 1990	FY 1991
Records reviewed by staff judge advocates	293*	174
Days from charging or restraint to sentence	34	35
Days from sentence to action	33	43

### Summary Courts-Martial

	FY 1990	FY 1991
Records reviewed by staff judge advocates	1130*	903
Days from charging or restraint to sentence	14	12
Days from sentence to action	8	8

\*Last Three Quarters

### **Court-Martial and Nonjudicial Punishment Rates**

Rates per Thousand<sup>61</sup>

Fourth Quarter Fiscal Year 1991  
July-September 1991

	Armywide	CONUS	Europe	Pacific	Other
<u>GCM</u>	0.36 (1.43)	0.34 (1.35)	0.41 (1.65)	0.53 (2.12)	0.87 (3.47)
<u>BCDSPCM</u>	0.18 (0.70)	0.19 (0.78)	0.14 (0.54)	0.29 (1.17)	0.00 (0.00)
<u>SPCM</u>	0.03 (0.13)	0.04 (0.14)	0.04 (0.16)	0.00 (0.00)	0.17 (0.69)
<u>SCM</u>	0.29 (1.17)	0.22 (0.90)	0.46 (1.86)	0.48 (1.90)	0.52 (2.08)
<u>NJP</u>	21.97 (87.87)	23.45 (93.80)	21.80 (87.21)	24.73 (98.93)	33.63 (134.51)

Note: Figures in parentheses are the annualized rates per thousand.

on sentencing matters, he or she also must be given "the right to be notified" of all sentencing matters.<sup>15</sup> To endow a party with the former right while denying him or her the latter simply "makes no sense."<sup>16</sup> The Court concluded that FRCP 32 and congressional intent in initiating the Guidelines must be interpreted as "promoting the focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences."<sup>17</sup> Adequate notice and an opportunity for each side to be heard are vital to this adversarial process.

After *Burns*, SAUSAs practicing in United States district courts are entitled to reasonable notice that a judge intends to depart from the Guidelines. This procedural requirement will not prevent upward or downward departures entirely, but it will protect the Government from surprise departures at sentencing hearings. Major Borch.

### Posttrial Agreements Inevitably Lead to Disagreements

After a general court-martial in which the accused is found guilty, or a special court-martial in which a bad-conduct discharge is adjudged, the staff judge advocate (SJA) must provide a posttrial recommendation to the convening authority before the convening authority may

take action.<sup>18</sup> Rule for Courts-Martial (R.C.M.) 1106(d)(3) prescribes the information that an SJA must include in his or her recommendation,<sup>19</sup> while R.C.M. 1106(d)(5) authorizes the SJA to include "optional matters" in the posttrial recommendation.

An SJA may include in his or her posttrial recommendation "any additional matters deemed appropriate,"<sup>20</sup> including adverse matter from outside the record. If the SJA places adverse matter from outside the record in the recommendation or the addendum,<sup>21</sup> however, he or she must provide the accused with notice and an opportunity to respond.<sup>22</sup> An interesting twist to these requirements appeared in *United States v. Cassell*.<sup>23</sup>

Airman First Class Eric R. Cassell pleaded guilty at a general court-martial to wrongful use of cocaine, larceny, and receiving stolen property.<sup>24</sup> The military judge sentenced the accused to a bad-conduct discharge, confinement for fifteen months, total forfeitures, and reduction to basic airman (E-1).<sup>25</sup> After trial, however, the chief of military justice and the trial defense counsel reached a "posttrial agreement."<sup>26</sup>

The chief of military justice notified the trial defense counsel that the legal office would recommend a two-

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 2187.

<sup>18</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1106(a) [hereinafter R.C.M.].

<sup>19</sup> R.C.M. 1106(d)(3) provides:

(3) *Required contents.* Except as provided in subsection (e) of this rule [which indicates when no recommendation is required], the recommendation of the staff judge advocate or legal officer shall include concise information as to:

(A) The findings and sentence adjudged by the court-martial;

(B) A summary of the accused's service record, to include length and character of service, awards and decorations received, and any records of nonjudicial punishment and previous convictions;

(C) A statement of the nature and duration of any pretrial restraint;

(D) If there is a pretrial agreement, a statement of any action the convening authority is obligated to take under the agreement or a statement of the reasons why the convening authority is not obligated to take specific action under the agreement; and

(E) A specific recommendation as to the action to be taken by the convening authority on the sentence.

<sup>20</sup> R.C.M. 1106(d)(5).

<sup>21</sup> R.C.M. 1106(f)(7).

<sup>22</sup> R.C.M. 1107(b)(3)(B)(iii); see also *United States v. Groves*, 30 M.J. 811 (A.C.M.R. 1990). In *Groves* the military judge recommended suspension of the adjudged bad-conduct discharge. *Groves*, 30 M.J. at 812. In the posttrial recommendation, the staff judge advocate identified the accused's "probable involvement in other misconduct" as a basis for rejecting the suggested suspension of the bad-conduct discharge. *Id.* The Army Court of Military Review held that a staff judge advocate may include in the posttrial recommendation matters from outside the record as long as the accused is given an opportunity to respond and no evidence suggests that the staff judge advocate is acting in bad faith or that he or she intends to mislead the convening authority. *Id.* at 812-13.

<sup>23</sup> 33 M.J. 448 (C.M.A. 1991).

<sup>24</sup> See Uniform Code of Military Justice arts. 112a, 121, 134, 10 U.S.C. §§ 912a, 921, 934 (1988).

<sup>25</sup> *Cassell*, 33 M.J. at 448.

<sup>26</sup> *Id.* at 449. After this point, the court apparently relied solely on the facts as provided by the affidavit of accused's trial defense counsel. See, e.g., *id.* at 450 ("too much occurred 'off-the-record'; too many matters concerning the appellant appear to have had an impact on the record, yet were not made a part of it").

In *United States v. Choy*, 33 M.J. 1080 (A.C.M.R. 1992), the Army Court of Military Review expressed its reluctance to "use ... 'eleventh-hour affidavits' provided by the Government to 'save a sinking record.'" *Id.* at 1083 n.2 (quoting *United States v. Perkinson*, 16 M.J. 400, 402 (C.M.A. 1983)). In *Cassell*, the Court of Military Appeals appeared to have gone one step further, embracing the trial defense counsel's affidavit without ever mentioning facts presented by the Government. The court apparently found no need to order a hearing in accordance with *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

month reduction in confinement if the accused received a "favorable recommendation" from the local Joint Drug Enforcement Task Force (JDET). As a result, the accused obtained and included with his request for clemency<sup>27</sup> a letter from a JDET Special Agent.<sup>28</sup>

Cassell, however, was in for an unpleasant surprise. Even though he apparently had fulfilled his part of the bargain, the staff judge advocate recommended in the addendum to the posttrial recommendation that the convening authority approve the adjudged sentence.

On appeal, the accused asserted that the staff judge advocate's "change of heart"<sup>29</sup> had occurred when the chief of military justice received information from "someone at JDET" that the accused had not been as helpful and honest as possible.<sup>30</sup> Noting that the staff judge advocate had failed to place this specific information in the addendum, the accused alleged that the staff judge advocate wrongfully had relied upon negative information from outside the record without allowing the accused notice and an opportunity to respond.<sup>31</sup>

Analyzing this issue, the Court of Military Appeals observed that the staff judge advocate did not present to the convening authority any new adverse matters in the addendum, noting specifically that the staff judge advocate did not list the adverse matter as a reason for denying clemency.<sup>32</sup> The staff judge advocate simply wrote in the addendum that the recommendation was based on "[w]eighing the matters presented by the accused at trial and through clemency [sic] against the facts and circumstances of his case."<sup>33</sup>

The court, however, concluded that "too much [had] occurred 'off-the-record.'"<sup>34</sup> First, the chief of military justice and the accused had entered into an off-the-record,

posttrial agreement.<sup>35</sup> Second, the staff judge advocate had relied on off-the-record adverse information in deciding that this agreement had not been satisfied.<sup>36</sup> Third, the accused did not receive any written notice of that information or have any occasion to respond to it.<sup>37</sup> Accordingly, the court found that the accused had not been allowed a "meaningful"<sup>38</sup> opportunity to respond.

*United States v. Cassell* demonstrates that both government and defense counsel should refrain from entering into informal posttrial agreements. *Cassell* exemplifies the difficulties of determining whether the terms of the agreement are satisfied. Moreover, *Cassell* warns that, if an SJA relies on adverse information from outside the record in deciding what recommendation to make, he or she must include that negative information in the recommendation. Only then will the accused have a "meaningful" opportunity to comment.<sup>39</sup> Major Cuculic.

#### ***United States v. Bibo-Rodriguez*—When May Courts Admit Evidence of Subsequent Misconduct in Criminal Proceedings?**

Military Rule of Evidence 404(b) is identical to Federal Rule of Evidence 404(b) and establishes a limited exception to the general inadmissibility of evidence of other crimes or acts. Both rules provide that

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>40</sup>

No per se approach is intended. Rather, the rules permit an attorney to present evidence if it is offered for a valid

<sup>27</sup>R.C.M. 1105.

<sup>28</sup>The letter stated:

AIRMAN ERIC CASSELL assisted AFOSI SAJDET in an on-going investigation. Cassell provided written statements and personally approached targets of our investigation. Although his actions did not reveal any new information we appreciated his assistance.

*Cassell*, 33 M.J. at 449, n.1.

<sup>29</sup>*Id.* at 449.

<sup>30</sup>Specifically, the accused alleged that "someone at JDET" told the chief of military justice that (1) the appellant "did not fully disclose his knowledge of drug users;" (2) the appellant lied when he claimed that he had used cocaine only once; and (3) the two individuals involved in the theft with the accused stated under oath that all the stolen money had been used for food, beer, and video games—not just some of the money as Cassell had claimed. *Id.*

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at 449-50.

<sup>33</sup>*Id.* at 450.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* The court emphasized that the SJA had provided no new, adverse information to the convening authority. See *id.* at 450 & n.2 ("[t]he irony here is that, if the staff judge advocate had advised the convening authority of his reasons for not recommending clemency, that information would have been more damaging to [Cassell] than the recommendation he now contests"). The real issue was the staff judge advocate's reliance on new matters from outside the record in deciding if the posttrial agreement was satisfied. *Id.* at 450.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>Fed. R. Evid. 404(b); Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(b).

purpose and the danger of undue prejudice does not outweigh substantially the probative value of the evidence.<sup>41</sup>

A recent decision of the Ninth Circuit Court of Appeals—*United States v. Bibo-Rodriguez*<sup>42</sup>—illustrates the use of this balancing approach to resolve an issue the military appellate courts apparently have not addressed. In *Bibo-Rodriguez*, the Ninth Circuit held that evidence of acts committed subsequent to the charged offense was admissible to show knowledge on the part of the accused, which is one of the purposes specified in Rule 404(b). Although *Bibo-Rodriguez* clearly isolates this issue, the admissibility of this evidence has been addressed in other decisions of the federal courts. Those decisions demonstrate that evidence of acts that occurred after the charged offense is admissible if it is relevant and the proponent of the evidence can satisfy the balancing test of Rule 403.

In *Bibo-Rodriguez*, the accused was convicted of importing 682 grams of cocaine into the United States.<sup>43</sup> The record indicates that Bibo-Rodriguez drove a white Chevrolet pickup truck into the United States on September 26, 1988. The truck was detained, but Bibo-Rodriguez was allowed to return to Mexico. When law enforcement agents searched the truck, they found the cocaine in the truck's roof panel. An arrest warrant then was issued for Bibo-Rodriguez. On December 2, 1988, Bibo-Rodriguez, who had returned to the United States, was arrested for selling thirty pounds of marijuana. He ultimately was released on bail the same day when the outstanding warrant did not show up on a records check. Before his release, however, he told a police officer that he routinely transported marijuana and cocaine from Mexico to the United States and that he had transported the marijuana at issue in the hollowed-out side panels of a Chevrolet Vega hatchback. When Bibo-Rodriguez was arrested a third time, on June 12, 1989, the arrest warrant pertaining to the September 26, 1988, offense was located and he was detained. Bibo-Rodriguez then claimed that he had been paid fifty dollars by a friend to drive the truck into the United States on September 26, 1988, and that he had known nothing about the cocaine in the roof panel of the truck.

At trial, Bibo-Rodriguez entered a conditional guilty plea after the judge overruled his motion to exclude the

December 2, 1988, statements and acts as inadmissible. The conditional plea preserved Bibo-Rodriguez's objection to the extrinsic act evidence.

In upholding admissibility of the evidence, the Ninth Circuit proceeded from the general to the specific. It noted that Rule 404(b) makes no distinction between prior and subsequent acts. The court then pointed out that, if the situation were reversed—that is, if the Government had offered evidence about the September 26, 1988, incident to establish Bibo-Rodriguez's knowledge on December 2, 1988—the extrinsic act evidence would have been admissible. The court explained,

The fact that one knowingly took drugs across the border on an earlier occasion leads to an inference that he or she was not an innocent dupe on a later occasion. There is an identical inference of knowledge when one charged with transportation of a controlled substance is shortly later found to transport knowingly in a similar manner a different controlled substance across the border.<sup>44</sup>

Next, the court reviewed the admissibility of Bibo-Rodriguez's admissions in the December 2, 1988, interview and the underlying December 2, 1988, offense. Holding that the statements were admissible as long as they were relevant, it concluded that their scopes and their proximities in time to the charged offense made them relevant. The court likewise held evidence of the December 2, 1988, acts relevant, even though different drugs had been involved in each incident. The court concluded that the evidence showed that Bibo-Rodriguez was not "duped" and that he knowingly had transported cocaine into the United States on September 26, 1988.<sup>45</sup>

In reaching its decision, the Ninth Circuit "decline[d] to follow three circuit courts which have disallowed subsequent 'other act' evidence to prove knowledge."<sup>46</sup> The decisions to which the court alluded were *United States v. Garcia-Rosa*,<sup>47</sup> *United States v. Jiminez*,<sup>48</sup> and *United States v. Boyd*.<sup>49</sup> Significantly, both *Garcia-Rosa* and *Jiminez* disavowed any intent to establish a blanket rule of exclusion. Moreover, other decisions that the Ninth Circuit declined to cite support admissibility of subsequent act evidence.

<sup>41</sup> See e.g. Fed. R. Evid. 404, notes of the advisory committee on 1972 Proposed Rules. The committee stated, "No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." *Id.*

<sup>42</sup> 922 F.2d 1398 (9th Cir.), cert. denied, 111 S. Ct. 2861 (1991).

<sup>43</sup> See 21 U.S.C. §§ 952, 960 (1988).

<sup>44</sup> *Bibo-Rodriguez*, 922 F.2d at 1400.

<sup>45</sup> *Id.* at 1402.

<sup>46</sup> *Id.* at 1400.

<sup>47</sup> 876 F.2d 209 (1st Cir. 1989).

<sup>48</sup> 613 F.2d 1373 (5th Cir. 1980).

<sup>49</sup> 595 F.2d 120 (3d Cir. 1978).

Rather than setting forth a rule of exclusion, two of the three cases the Ninth Circuit distinguished in *Bibo-Rodriguez* actually support admission of subsequent act evidence in appropriate cases. In *Garcia*, the First Circuit Court of Appeals reversed the conviction of Eduardo Rivera Ortiz for conspiracy to possess heroin and cocaine with intent to distribute and for importation of heroin and cocaine, holding that the trial court erroneously admitted evidence of Rivera Ortiz's subsequent unlawful possession of drugs. When law enforcement officers arrested Rivera Ortiz on August 13, 1986, they seized cocaine from his apartment. The Government later offered evidence of this seizure at trial to contradict the defense that Rivera Ortiz had loaned money to his alleged co-conspirators in a legitimate business transaction. The court noted that the evidentiary inference the Government sought to make, "that possession of cocaine at one point in time implies possession of cocaine nineteen months earlier," ran afoul of the basic proscription in Rule 404(b).<sup>50</sup> The court further noted that even if the extrinsic evidence concerned prior acts, the evidentiary chain was too "attenuated" to justify admission of the evidence.<sup>51</sup>

In *Jiminez*, the Fifth Circuit Court of Appeals reversed a conviction for heroin distribution after finding that evidence of subsequent cocaine possession was admitted improperly. Although it declined to bar all use of evidence of subsequent acts, the court concluded that the defendant's cocaine possession, which occurred one year after the charged offense, was too remote. The court also noted that "the extrinsic offense evidence los[t] the race toward admissibility before even reaching the starting mark" because the evidence did not establish that Jiminez actually possessed the cocaine.<sup>52</sup>

In *Boyd*, the Third Circuit Court of Appeals held that admission of evidence of discussions regarding the sale of P-2-P—a key component of methamphetamine—that occurred after the alleged closing date of a conspiracy, was reversible error. In *Boyd*, the trial court admitted the

evidence to permit the Government to show "intent or knowledge or [a] common type of plan or scheme." The appellate court expressly questioned the logic involved in this decision. *Boyd*, however, might be viewed best as a case involving evidence of a conspiracy. If so, it merely demonstrates that evidence of a defendant's acts subsequent to the charged ending date of the conspiracy may be inadmissible.<sup>53</sup>

The broader context likewise supports—but does not guarantee—admissibility of subsequent act evidence. For example, in *Dowling v. United States*,<sup>54</sup> the United States Supreme Court held that the Double Jeopardy Clause did not bar admissibility of evidence of a subsequent act when the defendant had been acquitted of the subsequent act. Although *Dowling* turned on the application of double jeopardy principles, not on Rule 404(b), the Court rejected the contention that the admission of the subsequent act evidence was fundamentally unfair. The conclusion that subsequent act evidence may be admitted in appropriate cases necessarily is subsumed in the broader conclusion that the admission involved no fundamental unfairness.

Other decisions reveal that subsequent act evidence may or may not be admissible to show: (1) predisposition;<sup>55</sup> (2) duress, or the absence of duress;<sup>56</sup> (3) a common plan or scheme;<sup>57</sup> and (4) intent.<sup>58</sup> Admissibility of the evidence will depend on its relevance. Unfortunately, no clear standards can be gleaned from existing caselaw. Temporal proximity is important, but—depending on the facts of the individual cases—acts occurring eight months after the charged misconduct may be too remote, while acts occurring fifteen months later may not.<sup>59</sup> That different drugs are involved in each act generally is not significant.<sup>60</sup>

This chaos suggests that to gain the admission of subsequent act evidence is a demanding test of the advocacy skills of trial and defense counsel. Although the courts

<sup>50</sup> *Garcia*, 876 F.2d at 221.

<sup>51</sup> *Id.*

<sup>52</sup> *Jiminez*, 613 F.2d at 1376.

<sup>53</sup> See *United States v. Buhl*, 712 F. Supp. 53, 56 (E.D. Pa. 1989) (distinguishing *Buhl* from *Boyd* and *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988) by stating that "the extrinsic evidence erroneously admitted in those cases was evidence of other acts to show a conspiracy existed after the charged conspiracy concluded").

<sup>54</sup> 493 U.S. 342 (1990).

<sup>55</sup> Compare *United States v. Moschiano*, 695 F.2d 236 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983) (admissible) and *North Carolina v. Goldman*, 389 S.E.2d 281 (N.C. App. 1991) (admissible) with *United States v. Miller*, 883 F.2d 1540 (11th Cir. 1989) (inadmissible to prove intent). In this regard, the Fifth and Eleventh Circuits view predisposition as a state of mind. See *United States v. Richardson*, 764 F.2d 1514, 1522 n.2 (11th Cir. 1985); *United States v. Webster*, 649 F.2d 346, 350 (5th Cir. 1981) (en banc).

<sup>56</sup> See *United States v. Hearst*, 563 F.2d 1331, 1336-7 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978); *Buhl*, 712 F. Supp. at 56.

<sup>57</sup> See *United States v. Terebecki*, 692 F.2d 1345 (11th Cir. 1982).

<sup>58</sup> Compare *Miller*, 883 F.2d at 1540 (eight months between acts too remote) with *Terebecki*, 692 F.2d at 1345 (fifteen months not too remote).

<sup>59</sup> See *United States v. Mehrmanesh*, 689 F.2d 822 (9th Cir. 1982) (prior and subsequent sales of cocaine speak to defendant's intent to sell heroin).

<sup>60</sup> See *Bibo-Rodriguez*, 922 F.2d at 1400; *Moschiano*, 695 F.2d at 236 (subsequent attempt to purchase commercial quantity of Preludin relevant to heroin offenses). But cf. *United States v. Daniels*, 572 F.2d 535, 538 (5th Cir. 1978) (subsequent possession of sawed-off shotgun not probative of predisposition to sell narcotics).

have warned that subsequent act evidence may be "less probative" than evidence of similar prior acts,<sup>61</sup> the evidence is relevant to the purposes of Rule 404(b). When counsel contemplate using or opposing the use of subsequent act evidence, they should keep in mind the need to identify specific Rule 404(b) purposes for the evidence and to perform the Rule 403 balancing test. Lieutenant Colonel Park, USAR.

### *International Law Note*

#### **Operational Law (OPLAW) Handbook Under Revision**

The *OPLAW Handbook*<sup>62</sup> has become the hornbook for deploying judge advocates. Its success has been noted widely; however, praise for the *Handbook* has been accompanied by pleas from the field that it be cut down to a "deployable" size. These requests, along with the dramatic changes that have occurred in the world since the *Handbook* first was developed in the mid-1980's, mandate that the *Handbook* now be revised.

Accordingly, the International Law Division of The Judge Advocate General's School (TJAGSA) is updating and reformatting the *OPLAW Handbook*. As always, any input from the field will be appreciated greatly. In particular, we ask judge advocates who were involved in Operations Nimrod Dancer, Just Cause, Promote Liberty, Desert Shield, Desert Storm, Provide Comfort, Sharp Edge, and Eastern Exit,<sup>63</sup> as well as peacekeeping missions, humanitarian assistance missions, drug interdiction missions, and other recent military operations, to submit appropriate materials. We thank those of you who already have contributed after-action reports and lessons learned from these operations and ask that you continue to support this project. The point of contact at the International Law Division, Major Mac Warner, may be reached at (804) 972-6374.

The International Law Division intends not only to reduce the size of the *Handbook*, but also to incorporate the new strategies and structures that influence today's military. The "new world order" envisioned by President Bush and the collapse of the Soviet Union have made America's "containment" strategy obsolete. In his National Security Strategy of August 1991, President Bush proclaimed a new plan of "Peacetime Engagement." Peacetime Engagement contemplates the use by the United States of "elements of [its] national power" to prevent wars and regional conflicts, instead of confronting adversaries in combat or in "cold war" sce-

narios. Recognized elements of national power include American military strength, public diplomacy, economic vitality, moral and political examples, and alliances.

Structurally, the shift in strategies has caused a corresponding change in the "military strength" component of America's national power. To accomplish the Peacetime Engagement mission, the 1992 National Military Strategy established a "Base Force" consisting of strategic deterrence, forward presence, crisis response, and force reconstitution. From this structure, the military will perform not only its traditional roles, but also new roles, such as drug interdiction and United Nations and regional peacekeeping missions.

Naturally, military attorneys have their roles in Peacetime Engagement as members of the Army staff, whether they are deployed forward, serve as a part of the contingency forces that comprise the power projection package, or serve with the force reconstitution element. An operational law attorney, however, plays a special role in the Peacetime Engagement mission because he or she is the staff expert on issues such as the legal use of force, rules of engagement, international agreements, and all other associated legal matters.

Proficiency in operational law promotes the military strength of the United States in its capacity as an element of national power. It allows the OPLAW attorney to walk the commander right up to the line between peacetime engagement and low intensity conflict. In this manner, the law becomes an arrow in the commander's quiver and can be used as a force multiplier.

The second edition of the *OPLAW Handbook* will pull all these concepts together to the extent that any "deployable handbook" can. Naturally, to understand fully the momentous changes that confront the Army of the 1990's, OPLAW attorneys must read, study, and discuss these matters. The International Law Division strongly advises OPLAW attorneys to attend an OPLAW Seminar at TJAGSA. The next two seminars are scheduled from 13 to 17 April 1992 and from 31 August to 4 September 1992. Operational law practitioners should note that, like the *OPLAW Handbook*, the OPLAW Seminar has undergone some changes. In particular, a classified (secret) seminar has been introduced, in which OPLAW instructors discuss the Joint Chiefs of Staff Peacetime Rules of Engagement. If you are working in the OPLAW arena, be sure your security clearances are in order; you should hold a top-secret clearance, if possible. Major Warner.

<sup>61</sup> See e.g. *Moschiano*, 695 F.2d at 236; cf. *Boyd*, 595 F.2d at 126 ("the logic of showing prior intent or knowledge by proof of subsequent activity escapes us").

<sup>62</sup> International Law Division, The Judge Advocate General's School, U.S. Army, Operational Law Handbook (Feb. 1989).

<sup>63</sup> Operations Sharp Edge and Eastern Exit were Marine Corps noncombatant evacuation order missions.

## Contract Law Note

### Fiscal Law Update: Funding of Reprocurement Contracts Policy Revised

In the December 1991 issue of *The Army Lawyer*,<sup>64</sup> we reported that the Comptroller of the Department of Defense had issued a policy memorandum<sup>65</sup> requiring the use of current fiscal year funds for reprocurement contracts. The Comptroller's policy was then under revision. On January 27, 1992, the Comptroller revised the August 12, 1991, memorandum.<sup>66</sup>

The effect of the January 27, 1992, policy statement is to return the funding of reprocurement contracts to the state of the law before August 12, 1991. Under the revised policy, contracting officers may use prior-year funds when awarding a reprocurement contract if *all* of the following conditions are met: (1) the agency has a continuing bona fide need for the goods or services; (2) the original contract was awarded in good faith; (3) the reprocurement contract is of the same size and scope as the original contract; (4) the replacement contract is

executed without undue delay; and (5) the contract is awarded to a different contractor. The notice provisions of 31 U.S.C. § 1553(c) apply to the reprocurement contract.<sup>67</sup> The only new requirement in the revised policy memorandum concerns the award of the replacement contract to a different contractor.

The revised policy memorandum also covers terminations for convenience when the termination results from a court order, from the decision of the General Accounting Office (GAO) or a board of contract appeals, or from a contracting officer's decision that the original contract was awarded improperly. The provisions that relate to terminations for convenience bring Defense Department policy in line with existing statutes and GAO decisions concerning the funding of the award of a replacement contract after a bid protest.<sup>68</sup> Major Dorsey.

### Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be

<sup>64</sup>Contract Law Note, *Fiscal Law Update: Funding of Reprocurement Contracts*, *The Army Lawyer*, Dec. 1991, at 39.

<sup>65</sup>Memorandum, Deputy Comptroller (Management Systems), Department of Defense, Aug. 12, 1991, subject: Contract Defaults Resulting in Reprocurement Actions, reprinted in *Contract Law Note*, *supra* note 64, at 39 n.25.

<sup>66</sup>Memorandum, Office of the Deputy Comptroller (Management Systems), Department of Defense, 27 Jan. 1992, subject: Contract Defaults Resulting in Reprocurement Contract Actions. The full text of the January 27, 1992, memorandum is set forth below:

#### MEMORANDUM FOR

Assistant Secretary of the Army (Financial Management)  
Assistant Secretary of the Navy (Financial Management)  
Assistant Secretary of the Air Force (Financial Management and Comptroller)  
Directors of the Defense Agencies  
Director, Washington Headquarters Services

SUBJECT: Contract Defaults Resulting in Reprocurement Contract Actions

In an August 12, 1991, memorandum, subject as above, guidance was provided regarding the use of expired appropriations for reprocurement actions after a contract is cancelled. This memorandum revises the previous August 12, 1991, guidance.

When a reprocurement action will result in a replacement contract, it may be funded from expired accounts if all of the following conditions are met:

- The DoD Component has a continuing bona fide need for the goods or services involved.
- The original contract was awarded in good faith.
- The original contract was terminated for default or for the convenience of the Government. If the original contract was terminated for the convenience of the Government, the termination was the result of a:
  - Court Order.
  - Determination by a contracting officer that the contract award was improper when there is explicit evidence that the award was erroneous and when the determination is documented with appropriate findings of fact and of law.
  - Determination by other competent authority (the General Accounting Office or a Board of Contract appeals [sic]), that the contract award was improper.
- The replacement contract is:
  - Substantially of the same size and scope as the original contract.
  - Executed without undue delay after the original contract is terminated.
  - Awarded to a different contractor.

—Actions resulting in obligations which exceed \$4 million and \$25 million are submitted to the DoD Comptroller and the Congress, respectively, for prior approval.

If you have questions on this matter, please contact Ms. Susan M. Williams, of my staff, on (703) 697-3193.

/s/ Sean O'Keefe

<sup>67</sup>Reprocurement obligations that would result in awards greater than \$4 million must be approved in advance by the DOD Comptroller. *Id.* Awards greater than \$25 million require notice to Congress. *Id.*

<sup>68</sup>The provisions of 31 U.S.C. § 1558 govern funding of contracts after protest to the GAO. See 68 Comp. Gen. 158 (1988) (award of replacement contract using prior year funds after court ordered termination); Ms. Comp. Gen., B-238548 (Feb. 5, 1991) (award of contract using prior year funds after contracting officer decision to terminate for convenience because award was improper).

adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

**American Bar Association—Legal Assistance  
for Military Personnel Committee  
Continuing Legal Education Seminars**

The American Bar Association (ABA) Standing Committee on Legal Assistance for Military Personnel (LAMP) will hold its next quarterly continuing legal education (CLE) seminar and business meeting in Yorktown, Virginia, on 7 and 8 May 1992. The ABA has scheduled subsequent seminars at Fort Leavenworth, Kansas on 18 and 19 June 1992 and at the Naval Justice School at Newport, Rhode Island, on 29 and 30 October 1992.

The CLE program consists of an all-day seminar for Reserve, civilian, and active duty legal assistance attorneys. Civilian practitioners will discuss a variety of topics, including basic and advanced will drafting, estate planning, and selected family law issues. The CLE fee is fifty dollars.

For more information on any ABA-LAMP meeting, contact the ABA-LAMP staff liaison, Gwen Austin, at (312) 988-5760. Major Hancock.

**Family Law Note**

*Use of Liens to Enforce Child Support Obligations*

A lien is a means of encumbering the transfer of real or personal property. Like a garnishment or a wage assignment, a lien can be an effective tool for securing the payment of child support and arrearages.

Federal law requires all states to enact and maintain "procedures under which liens are imposed against real and personal property for amounts of overdue [child] support."<sup>69</sup> Federal law, however, does not dictate the types of liens that states must permit or the procedures that a support obligee—that is, the custodial parent—must follow to obtain a lien. As a result, state laws differ substantially in their requirements for perfecting liens and in the obligations they actually allow to be secured by liens.

In general, a lien is activated, or "perfected," through the legal act of "recording." Recording is accomplished

by filing certain documents required by local law with the appropriate office. Usually, a lien must be recorded in the county in which the debtor's property is located or registered. Some states, however, have eliminated the need for multiple recordings by creating a central registry for liens.<sup>70</sup>

To increase the utility of liens, some states allow support obligees to perfect liens simply by recording their support orders.<sup>71</sup> In those states, no default in support payments is needed to cloud a noncustodial parent's title in the affected real or personal property. Most states, however, require that an actual default and accrual of arrearages occur before they will permit a custodial parent to perfect a lien against a support obligor through recording.<sup>72</sup>

Laws requiring actual default effectively limit a custodial parent's use of liens to situations in which a support arrearage exists. Moreover, the default requirement often adversely affects a support obligee's "priority date." Liens perfected "first in time" generally take priority over other judgment liens and unsecured creditors. Priority becomes critical when a debtor's equity in the encumbered property is insufficient to satisfy all the liens recorded against it. If the demands of high-priority lienholders exhaust the equity, lien holders of lower priority will receive nothing when the property is sold.

With the advent of automatic wage withholding, a noncustodial parent's failure to pay child support often follows the onset of other financial defaults. These other defaults commonly result in the recording of judgment liens against the noncustodial parent's property. In states in which an arrearage must accrue before a lien may be recorded, a custodial parent probably will lose any "race to the courthouse" to achieve high-priority lienholder status. Moreover, in these states, the custodial parent may have to file multiple recordings to secure arrearages as they accumulate.<sup>73</sup>

A support obligee cannot recover child support simply by recording a lien. A custodial parent often may collect support payments only when the noncustodial parent hopes to sell the encumbered property and needs the lien released, or—if state law permits—when the custodial parent forecloses the lien or resorts to "levy and sale under [a] writ of execution."

Forced sales, however, usually are expensive to conduct. Moreover, they frequently yield sales prices below the value of the debtors' equities in the properties. Further, a support obligee must consider the potential impact

<sup>69</sup> 42 U.S.C. § 666(a)(4) (1988).

<sup>70</sup> See, e.g., Fla. Stat. Ann. § 61.1352 (West 1988).

<sup>71</sup> See, e.g., Cal. Code. § 4383 (West 1991).

<sup>72</sup> See, e.g., Vt. Stat. Ann. tit. 15 § 791 (1991).

<sup>73</sup> See, e.g., Mich. Comp. Laws Ann. § 552.625 (West 1988).

of a forced sale on the noncustodial parent's ability to pay child support. For example, forcing the noncustodial parent to sell his or her automobile may cost that parent his or her job, creating a change of circumstances that might justify a reduction of the support obligation.

A legal assistance attorney advising a support obligor who faces the forced sale of his or her encumbered property to satisfy a lien should become familiar with the appropriate state's debtor protection laws. Many states allow debtors time to redeem foreclosed or levied property or exempt certain types of property entirely from forced sales. In other states, property cannot be sold at a forced public sale at a price substantially below its fair market value.

In general, however, when a custodial parent uses a lien to force the payment of child support arrearages, the optimal solution for the support obligor is to negotiate a release of the lien following satisfaction of accrued arrearages. Consequently, attorneys representing non-custodial parents in support disputes should be familiar with the proper methods of releasing a lien under applicable state law. Major Connor.

### Survivor Benefits

#### *Survivor Benefit Plan—Open Enrollment Period*

Many former service members believe that they are "locked" into the coverage they have chosen under the Survivor Benefit Plan (SBP). Likewise, former service members who decided not to participate in the plan may think they are barred from coverage forever. This is not so.

The provisions of 10 U.S.C. § 1448, as amended by Public Laws 101-189<sup>74</sup> and 102-190,<sup>75</sup> create a one-year, "open enrollment" period, beginning 1 April 1992, during which many former service members may alter their existing SBP or may elect to participate in the SBP program for the first time.

Who may elect into the program? Eligible retirees and former service members who, as of 31 March 1992, are not SBP participants and who either are entitled to retired pay or, as Reservists, could claim retired pay were they

not under sixty years of age may elect to participate in the basic plan. They also may elect to participate in the Supplemental Survivor Benefit Plan, provided that they first request full basic coverage.<sup>76</sup>

Who may change coverage? Individuals who have less than full coverage may increase it. An SBP participant who has covered a dependent child, but not his or her spouse or former spouse, may elect to add coverage for the spouse or former spouse at a base amount not less than the base amount provided for the dependent child.

With certain limitations, any person who, as of 31 March 1992, already has basic SBP for a spouse or former spouse may obtain supplemental coverage, if: (1) the participant's basic coverage is already at the maximum amount; or (2) he or she increases the basic coverage to the maximum amount.<sup>77</sup> Public Law 102-190 amends 10 U.S.C. § 1457 to allow participants four choices for additional coverage. They may increase their monthly spousal annuities by five percent, ten percent, fifteen percent, or twenty percent of the base amounts under their basic SBPs.<sup>78</sup>

Elections made during the open enrollment period must be made in writing, must be signed by the person making the election, and must be received by the appropriate service secretary before the open enrollment period ends.

Each open enrollment plan includes the caveat that the member must live more than two years after the effective date of election. If he or she fails to do so, the election is void and the government will pay the premium deductions in a lump sum to the would-be beneficiary.

The opportunity to elect-in or increase coverage is not without cost. The Secretary of Defense may increase a premium by an amount stated as a percentage of the base amount that reflects the number of years that have elapsed since the person retired. This increase, however, "may not exceed 4.5 percent of that person's base amount."<sup>79</sup>

Regulations are being drafted to implement the new SBP amendments. The Army and Air Force Mutual Aid Association is preparing information papers to explain the changes.<sup>80</sup> The Community and Family Support Cen-

<sup>74</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1405, 103 Stat. 1352, 1586 (1989).

<sup>75</sup>National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. 102-190, § 653, 105 Stat. 1290, 1388 (1991).

<sup>76</sup>Public Law 102-190 amended 10 U.S.C. § 1458(a)(1) to clarify that maximum basic coverage is required to elect supplemental coverage. *See id.* § 653(c), 105 Stat. at 1388.

<sup>77</sup>*Id.* § 653(c)(2), 105 Stat. at 1389.

<sup>78</sup>*Id.* § 653(b)(1), 105 Stat. at 1388 (amending 10 U.S.C. § 1457(b) (1988)).

<sup>79</sup>*Id.* § 653(a), 105 Stat. at 1388 (to be codified at 10 U.S.C. § 1448(j)). The exact cost will not be available until the Defense Department publishes applicable regulations.

<sup>80</sup>For more information, call (800) 336-4538 or write to the following address:

Army and Air Force Mutual Aid Association  
Fort Myer  
Arlington, VA 22211-5002.

ter also will publish information for retirees in an upcoming *Army Echo* newsletter.<sup>81</sup> Major Hostetter.

## Tax Notes

### Corrections to IRS Publications

The Internal Revenue Service (IRS) recently announced several noteworthy corrections to some IRS publications that legal assistance attorneys frequently use.

#### Single Taxpayers and the Earned Income Credit

For 1991 returns, a taxpayer who files as single may qualify for the earned income credit (EIC) if he or she has a qualifying child and meets the other EIC requirements.<sup>82</sup> Two IRS publications<sup>83</sup> incorrectly stated that taxpayers who file as single cannot qualify for the EIC. According to the IRS,<sup>84</sup> practitioners should delete the following statement from Publication 17, *Your Federal Income Tax*, at page 16, and from Publication 501, *Exemptions, Standard Deductions, and Filing Information*, at page 4: "If you file as single, you do not qualify for the earned income credit."

#### Miscellaneous Deductions and the Home Office

The IRS also announced that the discussion in Publication 17 on the limit on the deduction for the business use of a taxpayer's home<sup>85</sup> should read as follows:

*Limit on the deduction.* The deduction for the business use of your home is limited to the gross income from that business use minus the sum of:

(1) The business percentage of the otherwise deductible mortgage interest, real estate taxes, and casualty and theft losses, and

(2) The expenses for your business that are not attributable to the use of your home (for example, salaries or supplies).<sup>86</sup>

The IRS also advised legal assistance attorneys and tax advisors to make the same change to Publication 529, *Miscellaneous Deductions*.<sup>87</sup> Major Hancock.

### New IRS Publications

The IRS has announced the availability of two new IRS publications.<sup>88</sup> It recently released Publication 946, *How to Begin Depreciating Your Property*, and Publication 947, *Practice Before the IRS and Power of Attorney*. \*

Publication 946 is intended primarily for taxpayers figuring a depreciation deduction for the first time. According to the IRS, Publication 946 is

printed in a two-column, large print format and contains a glossary. Its step-by-step approach explains the section 179 deduction, how to depreciate property using the modified accelerated cost recovery system (MACRS), and rules for listed property. Throughout the publication are examples and worksheets designed to help taxpayers understand and determine if property is eligible for the section 179 deduction or depreciation and, if [they are] eligible, to help them figure these deductions.<sup>89</sup>

<sup>81</sup>For more information, call DSN 221-2695 or write to the following address:

Community and Family Support Center  
Attention: CFSC-FSR  
2461 Eisenhower Avenue  
Alexandria, VA 22331-0521.

<sup>82</sup>The EIC is a special credit for lower-income workers with children that actually live with them. This year, the EIC is composed of three different credits: the basic credit, the health insurance credit, and the extra credit for a child born in 1991. To take any of the credits, a taxpayer:

- must have a qualifying child who lived with the taxpayer for more than six months (12 months for a foster child);
- must have earned some income during 1991;
- must have earned income and adjusted gross income less than \$21,250;
- must file a tax return covering a 12-month period (unless a short period return is filed because of an individual's death);
- must not file as a married taxpayer filing separately;
- may not be a qualifying child of another person;
- must have a qualifying child, who cannot be claimed as the qualifying child of a third person whose adjusted gross income exceeds the taxpayer's; and
- must not have excluded from his or her gross income any income that he or she earned in foreign countries, or have deducted or excluded a foreign housing amount.

See generally Internal Revenue Serv., Pub. 596, *Earned Income Credit* (1991).

<sup>83</sup>Internal Revenue Serv., Pub. 501, *Exemptions, Standard Deduction, and Filing Information* (1991); Internal Revenue Serv., Pub. 17, *Your Federal Income Tax* (1991) [hereinafter IRS Pub. 17].

<sup>84</sup>IRS Announcement 91-185, 1991-52 I.R.B. 28.

<sup>85</sup>See IRS Pub. 17, *supra* note 83, at 172, col. 3. Legal assistance attorneys may want to refer taxpayers to Publication 587, *Business Use of Your Home*, for more information on home office deductions.

<sup>86</sup>IRS Announcement 92-3, 1992-2 I.R.B. 23.

<sup>87</sup>*Id.* (amending Internal Revenue Serv., Pub. 529, *Miscellaneous Deductions*, at 2, col. 3 (1991)).

<sup>88</sup>IRS Announcement 91-186, 1991-52 I.R.B. 28; IRS Announcement 92-2, 1992-2 I.R.B. 23.

<sup>89</sup>IRS Announcement 91-186, 1991-52 I.R.B. 28.

Although Publication 946 duplicates some information contained in Publication 534, *Depreciation*,<sup>90</sup> the IRS will continue to distribute Publication 534 to taxpayers who need information about other depreciation methods, such as the accelerated cost recovery system (ACRS).

New Publication 947 is a "plain-language publication" designed to assist both tax practitioners and taxpayers who want to appoint representatives. It contains detailed information on rules governing practice before the IRS and authorization of representatives. It also discusses the uses of Form 2848, *Power of Attorney and Declaration of Representative*, and new Form 8821, *Tax Information Authorization*.<sup>91</sup>

Taxpayers desiring copies of these publications or of any other IRS publication or form may contact the IRS Forms Distribution Center for their areas, as listed in their federal income tax instruction packages, or they may call the IRS toll-free at 1-800-829-3676. Major Hancock.

#### *Deductibility of Home Mortgage "Points"*

The IRS recently announced that a taxpayer who bought or will buy a home after 1990 may deduct the points he or she paid or will pay when purchasing his or her primary home.<sup>92</sup> A qualifying taxpayer who itemizes deductions may deduct on his or her tax return for the year he or she purchased the home all the "points"<sup>93</sup> that he or she has paid, provided the taxpayer satisfies this five-part test:<sup>94</sup>

- The settlement statement (Form HUD-1) identifies the points—for example, the loan origination fee or the loan discount.
- The points are determined as a percentage of the borrowed amount.
- The points the taxpayer paid were charged pursuant to an established local business practice of charging points for the acquisition of a personal

residence and the amount paid does not exceed the amount generally charged for that area.<sup>95</sup>

- The taxpayer has paid the points in connection with the acquisition of the taxpayer's principal residence and this residence is the security for the loan.
- The taxpayer paid the points directly.

This last requirement is satisfied if, at settlement, the taxpayer paid "from funds that have not been borrowed for this purpose as part of the overall transaction ... an amount at least equal to the amount required to be applied as points at the closing."<sup>96</sup> The IRS will consider a taxpayer's downpayment, escrow deposits, earnest money and other funds that the taxpayer actually paid over at closing in determining whether the taxpayer actually paid an amount at least equal to the amount of points charged. If the taxpayer simply financed the "points" by increasing the loan amount without paying an amount at least equal to the amount of the points, the taxpayer does not satisfy this part of the test.

The new rules on points deductibility apply only to a loan for the acquisition of a principal residence. They do not apply to improvement loans; nor do they apply to points paid on loans for the purchase or improvement of a residence that is not the taxpayer's principal residence—that is, for example, a second home, vacation property, or investment property. Finally, the rules do not apply to points paid on refinancing a principal residence.<sup>97</sup>

The following example illustrates the new rule. Suppose that, in 1991, Sergeant Taxpayer bought a \$100,000 home with \$5000 in cash she withdrew from her savings account and a \$95,000, thirty-year loan. The mortgage lender charged two points and Sergeant Taxpayer increased the loan amount to \$96,900—adding \$1900 to cover the two points. Before the IRS changed Revenue Procedure 92-12, Sergeant Taxpayer could not have deducted the \$1900 in points. Now, however, she may deduct the full \$1900 on her 1991 tax return<sup>98</sup>—even

<sup>90</sup>Internal Revenue Serv., Pub. 534, *Depreciation* (1991).

<sup>91</sup>Form 8821 is the taxpayer's authorization for the taxpayer's designee to inspect and receive confidential information from the IRS.

<sup>92</sup>Rev. Proc. 92-12, 1992-3 I.R.B. 27.

<sup>93</sup>Mortgage lenders routinely charge points, or up-front interest, on mortgage loans. One point is one percent of the borrowed amount. For example on a \$100,000 loan, one point would be \$1000. Borrowers usually pay this interest charge—also called a loan origination fee—at closing.

<sup>94</sup>See Rev. Proc. 92-12, 1992-3 I.R.B. 27 (announcing IRS's adoption of the five-part test).

<sup>95</sup>Rev. Proc. 92-12 provides that "if amounts designated as points are paid in lieu of amounts that are originally stated separately on the settlement statement (such as appraisal fees, inspection fees, title fees, attorney fees, property taxes, and mortgage insurance premiums) those amounts are not deductible as points under this revenue procedure." *Id.*

<sup>96</sup>*Id.*

<sup>97</sup>*Id.* Points paid on loans obtained to refinance an existing mortgage are deductible in full in the year they are paid, but only if they are paid in connection with a loan for the improvement of a home. Points paid to obtain lower monthly payments may be deducted only over the life of the loan.

<sup>98</sup>Sergeant Taxpayer may deduct the points if she can claim enough other deductions to itemize using Form 1040, Schedule A, *Itemized Deductions*. Otherwise, she may be able to use the points purchase expenses to increase her moving expenses.

though she did not pay the points out of her separate funds at closing—because she did pay \$5000 out of her savings account. Major Hancock.

### ***Administrative and Civil Law Note***

#### **Digest of Opinion of The Judge Advocate General**

##### ***Official Use of Government Motor Vehicles***

Army Regulation 58-1 implements Army policy on the use of administrative-use motor vehicles.<sup>99</sup> Paragraphs 2-5 and 2-6 of the regulation outline authorized and unauthorized uses. Government motor vehicles generally may be used only for official purposes. Some guidance in the regulation, however, is subject to local interpretation. A Training and Doctrine Command (TRADOC) installation recently asked The Judge Advocate General to interpret paragraph 2-5c of AR 58-1.

Paragraph 2-5c states that "motor vehicle support may be provided for authorized activities when commanders decide that failure to do so would have an adverse effect on morale of service members." The regulation provides examples of authorized activities, including morale, welfare, and recreation (MWR) events, and points out that vehicle use may not interfere with mission needs or generate requirements for additional vehicles.

The TRADOC installation interpreted this provision as follows: (1) the language creates an exception to the "official purpose" restriction; and (2) the exception applies only to recognized MWR activities conducted on the installation. The Judge Advocate General, however,

stated that—with only two statutory exceptions—Army administrative motor vehicles may be used only for "official purposes."<sup>100</sup> The language in paragraph 2-5c, AR 58-1, does *not* create an exception; it merely exemplifies morale-enhancing activities that may be considered uses for "official purposes."<sup>101</sup> Moreover, the examples in the regulation are not exclusive. The regulation affords a commander the discretion to determine when a particular use of a vehicle supports an "official purpose."<sup>102</sup> In making this determination, the commander must consider all pertinent factors, including whether the use is essential to the activity and consistent with the purpose for which the vehicle was acquired.<sup>103</sup>

The Judge Advocate General also stated that the use of administrative motor vehicles for activities that enhance morale is only one example of an "official use."<sup>104</sup> A commander may authorize use of government vehicles for any lawful administrative function, activity, or operation, on or off post, as long as the use furthers a valid unit mission.<sup>105</sup>

To prevent misuse, or the appearance of misuse, of government vehicles, commanders should scrutinize every request for the use of an administrative vehicle.<sup>106</sup> The commander should ensure that the activity is authorized, that a valid and articulable rationale supports the use of the vehicle, and that the proposed use has "a direct nexus to mission achievement."<sup>107</sup> Finally, the proposed use must not be otherwise prohibited by law, regulation, or higher authority.<sup>108</sup> Commanders should consult with their legal advisors when making decisions on the authorized uses of administrative motor vehicles.<sup>109</sup> Major McCallum.

<sup>99</sup>See generally Army Reg. 58-1, Motor Transportation: Management, Acquisition, and Use of Administrative Use Motor Vehicles (15 Dec. 1979) [hereinafter AR 58-1].

<sup>100</sup>DAJA-AL 1991/2978 at 1 (23 Dec. 1991).

<sup>101</sup>*Id.*

<sup>102</sup>*Id.*

<sup>103</sup>*Id.* (citing AR 58-1, para. 1-3b(5)).

<sup>104</sup>*Id.* at 2.

<sup>105</sup>*Id.*

<sup>106</sup>*Id.* at 1.

<sup>107</sup>*Id.*

<sup>108</sup>*Id.*

<sup>109</sup>*Id.* at 2.

## **Claims Report**

### ***United States Army Claims Service***

#### **Analysis of the Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules\***

##### ***Introduction***

After two years of negotiation, the Army, Navy, and Air Force Claims Services agreed to sign a new Joint

Military-Industry Memorandum of Understanding (MOU) on Loss and Damage Rules with the carrier industry. This new MOU applies to shipments *picked up* after 1 January 1992. It is intended to clarify ambiguities in the 20 April 1984 MOU (reprinted in appendix E, section II, Dep't of Army, Pam. 27-162, Claims (15 Dec. 1989) (hereinafter

\*The United States Army Claims Service previously distributed the following note as a bulletin to claims offices throughout the Army. To minimize confusion in the field, this note has been reprinted in *The Army Lawyer* without modification to the text.

DA Pam 27-162)) and to partially address some carrier concerns.

The carrier industry has been pushing for changes to the 20 April 1984 MOU since 1988, and the industry has enlisted congressional support at several stages of the negotiating process. The new MOU represents a tolerable compromise between the position of the military services and that of the carrier industry. It does, however, involve changes in claims office procedures, particularly with regard to carrier repair estimates. The following paragraph by paragraph analysis is intended to highlight and explain changes from the previous MOU.

#### *Paragraph I. Notice of Loss and Damage*

Paragraph I.(A) of the new MOU replaces paragraph A.(1) from the 20 April 1984 MOU. To clarify matters for the carriers, the new paragraph now explicitly recognizes that inspection at delivery is the joint responsibility of the carrier and the service member, and that the military services will dispatch the DD Form 1840R (Notice of Loss) to the address the carrier lists in block 9 of the DD Form 1840 (Joint Statement of Loss or Damage at Delivery). Claims offices should emphasize to carriers that if the carrier allows its agent to list an address other than the carrier's home office in block 9, the DD Form 1840R will go to the address listed.

To quell fears on the part of some carriers, a footnote to the new paragraph I.(A) addresses how the military services view use of the origin inventory. The information on the inventory is valid evidence that the claims office should consider in determining whether to pay or to assert recovery on a claim. The inventory is not conclusive, however, and claims personnel should also consider evidence showing that an inventory is not accurate. If, for example, the carrier delivered a damaged sofa, the carrier would not be relieved of liability simply because the sofa was not listed on the inventory.

Paragraph I.(B) of the new MOU replaces paragraph B from the 20 April 1984 MOU. Both the old paragraph and the new paragraph permit claims offices to dispatch the DD Form 1840R to the carrier after the normal 75-day notice period in instances where good cause for the delay is shown, as when the claimant was hospitalized or on an officially recognized absence (for example, extended temporary duty). When the claims office extends the notice period past the normal 75 days for an officially recognized absence, the new paragraph now requires claims offices to provide the carrier with proof of the absence.

The "proof" that the claims office must provide will vary, depending on circumstances. The claims office might provide a copy of the claimant's TDY travel orders, or it might provide a statement by the claimant's first sergeant that the claimant's unit was deployed to Saudi Arabia for three months.

Paragraph I.(C) replaces paragraph A.(2) of the 20 April 1984 MOU. There is no change in substance.

#### *Paragraph II. Inspection by the Carrier*

Paragraphs II.(A) and (B) replace paragraphs C.(1) and (2) from the 20 April 1984 MOU. Paragraph II.(A) restates that the carrier has a right to inspect damaged items. It shortens the carrier's inspection period from 75 days after delivery or 45 days after dispatch of the last 1840R (whichever is longer), to 45 days after delivery or 45 days after dispatch of the last 1840R (whichever is longer). Because the inspection period only would be reduced if the claims office dispatches the DD Form 1840R within 30 days of delivery or does not dispatch a DD Form 1840R at all, this change is not significant. Moreover, on code 1 and 2 shipments, even after expiration of the inspection period, the claimant still would have to retain damaged items for possible salvage by the carrier.

Paragraph II.(B) states that if the service member refuses to allow the carrier to inspect and the carrier contacts the claims office for assistance, the claims office will contact the service member to facilitate inspection and grant the carrier additional days to inspect. If contacted, claims offices should instruct recalcitrant claimants to allow the carrier to inspect and should deduct lost potential carrier recovery in accordance with DA Pam 27-162, paragraph 2-55a(6) if a claimant continues to refuse inspection.

When the claimant refuses to allow the carrier to inspect and the carrier contacts the claims office, the MOU specifies that the claims office will provide the carrier with an equal number of additional days to inspect. Because there is no set formula for precisely measuring how many days an "equal" number is, claims offices should strive to grant the carrier a reasonable number of additional inspection days based on the particular facts and circumstances.

Occasionally, an exasperated claimant will refuse to allow inspection after the carrier has missed an inspection appointment or has otherwise abused the inspection process. Claims offices should try to resolve these situations fairly, and should contact USARCS for guidance or assistance if necessary.

A few carriers have sent out form letters to claims offices requesting the claims office to contact claimants initially and set up inspections for them. The MOU only obligates claims offices to facilitate inspections after the claimant has refused to allow the carrier to come. Claims offices should advise such carriers that the MOU does not obligate the claims office to contact claimants initially, because that is the carrier's responsibility, and that the claims office will only intervene in the carrier inspection process after a carrier has made a serious effort to initiate an inspection and been rebuffed by the claimant.

This same reasoning would apply in interpreting the Joint Military-Industry Memorandum of Understanding on Salvage (reprinted in appendix E, section I, DA Pam 27-162). A carrier who merely sends out a letter requesting salvageable property, but makes no effort to pick up items or ascertain whether the items are available for pickup prior to contacting the claims office, is not entitled to any salvage credit and should be so advised.

### *Paragraph III. Repair Estimates Submitted by the Carrier*

Paragraph III is completely new. This paragraph modifies the instructions originally published in *The Army Lawyer* for using carrier estimates (see Personnel Claims Note, *Repair Estimates Provided by Carriers*, The Army Lawyer, Oct. 1987 at 60). If an *itemized* carrier's estimate from a *responsible* firm is the lowest estimate overall, a claims office will use it in the three instances outlined in paragraph III.(B):

(1) A claims office will use an otherwise acceptable carrier estimate received *prior* to the adjudication of the claim in the adjudication process. This reflects current Army practice.

(2) Even if a claimant has already been paid on a claim, a claims office will use an otherwise acceptable carrier estimate *received* within 45 days after *delivery* in the recovery process. This does not imply that a claims office will hold up adjudicating a claim received within 45 days after delivery, nor would a claim office recoup the difference between the carrier's estimate and the claimant's estimate from the claimant unless, of course, the claimant committed fraud. While this will cost the Army carrier recovery in some instances, very few claimants file and are paid within 45 days of delivery. Moreover, to provide estimates prior to the 45th day after delivery, carriers will have to record damage at delivery and inspect property promptly.

(3) If a claims office does not receive a carrier's estimate before the claim is adjudicated or within 45 days after delivery, the office will only use a carrier's estimate if the carrier establishes that the claimant's estimate was unreasonable. This reflects the standard set by the Comptroller General.

Except as provided in (1) and (3) above, USARCS strongly cautions claims offices *not* to accept a carrier's argument that the office should use a carrier estimate received "within 45 days after dispatch of the DD Form 1840R." Elements within the carrier industry desired this very strongly; the military services did not agree, and this is *not* what the MOU states.

Paragraph III.(A) requires claims offices to evaluate itemized carrier estimates from responsible firms in the same manner as any other estimate. When a claims office rejects a carrier estimate received in a timely manner (prior to adjudication of the claim, or within 45 days of *delivery*), the office must annotate the file with the rea-

sons for doing so and must inform the carrier. Claims offices may list their reasons either by annotating the DD Form 1843 (Demand on Carrier/Contractor) or by including a separate memorandum for record in the demand packet.

A claims office should reject a carrier's estimate received in a timely manner for many of the same reasons that the office would reject a claimant's estimate. A claims office should not use a carrier's estimate if the repair firm chosen by the carrier has a reputation for incompetence, does not provide an itemized estimate, lacks the skill to do the specialized repairs required, cannot perform the work in a timely manner, or is known to provide unreliable estimates (that is, the firm will provide an exaggerated estimate or an estimate below normal charges if requested to do so). Moreover, if the carrier provides an estimate from a repair firm that cannot perform the repairs in the claimant's home and is located a considerable distance from the claimant, the claims office should consider excessive drayage costs in determining whether a carrier's estimate should be used in either the adjudication or recovery process.

The situation may arise where a claimant uses a repair firm selected by the carrier and is dissatisfied with the result. Claims personnel should investigate and determine whether there is an objective basis for this, distinguishing between competent, workmanlike repairs and the "perfect" repairs that an unreasonable claimant may demand. If the repairs are not adequate, the claims judge advocate should contact the carrier and the carrier's repair firm and advise them of this. As with inadequate carrier repairs on Full Replacement Protection (Option 2) shipments, if the carrier and the carrier's repair firm are afforded an opportunity to correct the problem and cannot do so, the claims office should take whatever remedial action is appropriate based on the particular facts, which may include payment and assertion of a demand based on a higher repair estimate. Claims offices must document any such incident and should contact USARCS for assistance.

Paragraph III.(B)(4) allows carriers to conduct a second inspection if the carrier receives a DD Form 1840R after conducting an initial inspection based on the DD Form 1840. The carrier should, of course, conduct this second inspection within 45 days of dispatch of the DD Form 1840R in accordance with paragraph II.(A). This provision is intended to encourage early inspection by the carrier and to avoid placing a carrier who inspects and provides the claims office with an estimate at a disadvantage if the claimant comes in on the 70th day after delivery and reports a large amount of additional damage.

The paragraph also authorizes claims offices to credit carriers for up to \$50 of the cost of a second inspection if the claimant reports significant additional damage after the carrier already has inspected once. If the cost of a second inspection is less than \$50, the claims office should only award the actual costs.

Note, however, that a claims office may *only* credit the carrier for the cost of a second inspection if the carrier actually went out and inspected based on the DD Form 1840 prior to receiving a DD Form 1840R. Moreover, this provision does *not* apply every time the carrier goes out to inspect and later receives a DD Form 1840R. If the claimant showed the carrier the damaged items listed on the DD Form 1840R during the first inspection or has thrown the items away, there is no need to authorize payment for a second inspection.

Moreover, the claims office should not authorize payment for a second inspection if the later-discovered damage is not worth inspecting. The test should be whether a reasonable and prudent carrier would inspect. Obviously, a reasonable and prudent carrier would not inspect if the costs of inspection exceeded the potential carrier liability. Serious damage to a schrank would warrant a second inspection; three broken dishes would not.

To avoid difficulties over second inspections, claims offices should strongly encourage carriers making early inspections to ask the claimant to bring out any damaged items not listed on the DD Form 1840 at delivery. Claims offices should also strongly encourage carriers to call the office and find out whether the office will authorize payment for performing a second inspection *prior* to performing that inspection.

Paragraph III.(B)(5) specifies that the carrier must provide service members with copies of the repair estimate within a reasonable period of time, if requested. Occasionally, carrier repair firms will refuse to give claimants a copy of the estimate or will attempt to charge the claimant an estimate fee to provide a copy. This paragraph requires the carriers to provide a copy of the estimate to the service member, although the carriers insisted on having the home office receive a copy first. The intent behind this is to ensure that a claimant actually can have repairs performed by the repair firm providing the lowest estimate.

The last sentence in paragraph III.(B)(5) reflects the policy that claims offices will not accept repair "estimates" from firms that do not do repair work. Claims offices should not use appraisals disguised as "estimates" from carriers or claimants.

Paragraph III.(C) replaces paragraph D from the 20 April 1984 MOU. While the language is substantially changed, there is little change in substance. The new paragraph does state that claims offices will provide the carrier with a copy of the claimant's estimate used as part of the demand, which claims offices are already required to do.

#### *Paragraph IV. Carrier Settlement of Claims by the Government*

Paragraph IV.(A) replaces paragraph E from the 20 April 1984 MOU. It includes significant changes. The

first sentence specifies that a carrier must pay (that is, send a check), deny, or make a firm settlement offer within 120 days of receipt of a claim. This is intended to address the practices of some carriers who send "responses" asking for more documents around the 119th day after receiving a demand.

After receiving demands at their home offices, a few carriers apparently delay sending the demands to agents authorized to settle them and then demand additional time. Certainly, a demand delivered to a carrier's home office has been "received." As a rule of thumb, a claims office may assume that a carrier "receives" a demand within ten days after it was dispatched.

The second sentence in the new paragraph states that if a carrier makes an offer within 90 days of receipt of a demand, the military services will not offset the claim without providing the carrier with a written response to that offer. While, in theory, claims activities respond in writing to every settlement offer prior to offset, the military services declined to assure the carrier industry that they would do so in every instance where the carrier responds after the 90th day after receipt.

Paragraph IV.(B) replaces para F from the previous MOU without any significant change in substance.

#### *Paragraph V. Effective Date*

The MOU applies to shipments *picked up* after 1 January 1992. The 20 April 1984 MOU continues to apply to shipments picked up before that date.

#### *Conclusion*

The new MOU is in best interests of the military services. It will not greatly burden either service members or field offices, nor will it significantly reduce carrier recovery. Overall, it is a fair agreement which will deflect attempts by carriers to persuade Congress to legislate changes to the claims process. Mr. Frezza.

#### *Military-Industry Memorandum of Understanding on Loss and Damage Rules*

To establish the fact that loss or new transit damage to household goods owned by members of the military was present when the household goods were delivered at destination by the carrier.

##### *I. Notice of Loss and Damage.*

(A) Upon delivery of the household goods, it is the responsibility of the carrier to provide the member with three copies of the DD Form 1840/1840R and to obtain a receipt therefor in the space provided on the DD Form 1840. It is the joint responsibility of the carrier and the member to record all loss and transit damage on the DD Form 1840 at delivery. Later discovered loss or transit damage, including that involving packed items for which unpacking has been waived in writing on the DD Form

### Management Note

The 1992 United States Army Claims Service (USARCS) Claims Training Workshop will be held from 20 to 24 July 1992 at the Guest Quarters Suite Hotel, 1300 Concourse Drive, Baltimore-Washington International Airport, Linthicum, Maryland. The principal objectives of the workshop are to present recent legal developments in the claims field, to present the background and basis for policy developed by USARCS in the administration of the claims program, and to conduct training of general and specific interest to attendees.

The attendees for this workshop will be claims judge advocates and claims attorneys. This will be our one training and continuing legal education forum for claims

attorneys this year. All staff and command judge advocates are encouraged to make the time and funds available so their attorneys can attend; such an investment will pay many dividends in the future.

The United States Army Claims Service truly appreciates the excellent support and superb facilities that The Judge Advocate General's School provided for our past workshops held at the School. The location was changed to one closer to USARCS solely to permit us to use more fully the expertise and talents of our claims personnel in the training. It also will enable claims judge advocates and attorneys to visit USARCS to discuss their cases and the issues affecting them with their area action officers. We are confident that the greater interaction that this will provide between claims personnel will enhance the training our attendees will receive. Colonel Fowler.

## Labor and Employment Law Notes

*OTJAG Labor and Employment Law Office and TJAGSA Administrative and Civil Law Division*

### Disciplining Sexual Harassers

Two recent decisions on sexual harassment, one from the Merit Systems Protection Board (MSPB) and the other from the Equal Employment Opportunity Commission (EEOC), raise disquieting questions about how an agency should respond to a substantiated allegation of sexual harassment.

In *Julian v. Frank*, EEOC No. 01912215 (Equal Employment Opportunity Comm'n 1991), the EEOC decided a case involving the alleged sexual harassment of a postal employee by her immediate supervisor. At the initial hearing the administrative judge (AJ) found that the complainant had been subjected to repeated unwanted solicitations for dates from her immediate supervisor, who also occasionally put his hands around her waist, told her that "she did not know what young [sic] can do for her," and showed her a list of other female employees he had dated, encouraging her to add her name to the list. The Postal Service issued a final agency decision in which it adopted the AJ's recommended finding of discrimination. The Postal Service, however, modified the corrective relief recommended by the AJ. As amended, the complainant's remedy included the following:

(1) the Postal Service would take steps to ensure that the complainant's supervisor would not subject her to harassment or retaliation. It also would review the entire record to determine whether disciplinary action against the offending supervisor was warranted;

(2) the offending supervisor would receive comprehensive training on sexual harassment;

(3) the Postal Service would continue to monitor the activities of the complainant's unit to ensure that no Title VII violations occurred;

(4) the Postal Service would not act on actions addressed in a subsequent equal employment opportunity (EEO) complaint by the complainant until the resolution of that subsequent complaint; and

(5) the Postal Service would offer the complainant a position outside the unit. (The complainant, however, previously had refused reassignment.)

On appeal, the complainant alleged that neither the remedial relief recommended by the AJ, nor the relief ordered by the agency, afforded her the full scope of remedies available to her as a victim of sexual harassment and retaliation. She also asserted that the ordered relief was inadequate to protect her from further harassment.

The EEOC agreed, noting that an agency has an affirmative obligation to take all steps necessary to prevent sexual harassment. The Commission's order included the following remedies:

(1) The EEOC directed the Postal Service to take steps to prevent the complainant and other employees from being subjected to sexual harassment or reprisal in the future.

(2) The EEOC directed the Postal Service to review the matter that gave rise to the complaint to determine whether disciplinary action against the official who harassed the complainant was appropriate, to record the basis of its decision to take this action, and to report its findings and the basis of its decision to the Commission.

(3) The EEOC ordered the Postal Service to act immediately to ensure that the complainant did not remain under the supervision of the offending official. The Postal Service, however, could not require

the complainant to accept a transfer, a reassignment, or a change in shift.

(4) The EEOC ordered the Postal Service to continue to monitor the unit where the complainant was employed for Title VII violations until every vestige of the harassment and hostile work environment and reprisal found in the unit was eliminated.

Two weeks after *Julian* was decided, the MSPB examined sexual harassment from a different perspective. In *Hillen v. Army*, 50 M.S.P.R. 293 (1991), the MSPB dismissed two charges of sexual harassment against the appellant, finding that the alleged victims lacked credibility and that the agency had failed to show by a preponderance of the evidence that the appellant was guilty of sexual harassment. (In two prior decisions, the Board had reviewed the original charges and had reduced from five to three the number of victims originally specified. See *Hillen v. Department of the Army*, 29 M.S.P.R. 690 (1986) (*Hillen I*); *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987) (*Hillen II*)). The Board, however, did find that the evidence substantiated the charges of offensive touching of a sexual nature asserted by one of the appellant's subordinates. The Board concluded that Hillen had touched the victim's buttocks in an offensive, sexual manner. This act, the Board stated, was the appellant's only substantiated act of sexual misconduct. It found that this one act did not rise to the level of sexual harassment because it was neither pervasive, nor of sufficient severity seriously to affect a reasonable employee's work or psychological well-being. Based on these findings the Board directed the agency to cancel Hillen's removal.

Examined together, these decisions raise two questions: How would Hillen's victim have fared if she had made an EEO complaint alleging that Hillen, an individual in her supervisory chain, had subjected her to sexual harassment? Will Julian's supervisor prevail if he is disciplined as a result of the EEOC decision and then appeals that discipline to the MSPB?

The apparently contradictory conclusions of the EEOC and the MSPB may be harmonized to some extent by comparing the severity of the alleged sexual harassments. In *Hillen* the Board found only one incident of offensive sexual conduct toward a subordinate. In *Julian*, however, the supervisor's offensive conduct was repeated over a ten month period. Even so, some points in the EEOC opinion seem to fly in the face of the Board's decision in *Hillen*. The Commission was adamant that Julian and her coworkers should not have to experience sexual harassment in the workplace, that Julian should not have to continue to work under the supervisor that harassed her, and that the agency should monitor that workplace for possible sexual discrimination. The Board in *Hillen* articulated none of these concerns. The diversity of these opinions appears to imply that one forum has been created to protect sexual harassers and another to protect

their victims. That might be an acceptable alternative, if the same standards were applied in both fora.

The resolution of the dilemma will have to come from the courts. Until then, labor counselors can take several steps to lessen the likelihood that their clients will end up in a *Hillen* or a *Julian* situation:

(1) A labor counselor that is advising an agency on the proposed discipline of a supervisory employee found to have committed sexual harassment based on the EEOC standard should apply the analysis in *Hillen*. He or she should consider whether the harassment was pervasive or sufficiently severe to have an adverse psychological impact on a reasonable employee. Although a single incident may be enough to form the basis for disciplinary action, it must be an incident serious enough to sustain an action under the *Hillen* test.

(2) If the labor counselor is advising an agency about a complaint by an employee that the agency has determined to be the victim of sexual harassment, he or she should fashion the remedy in light of the criteria the EEOC applied in *Julian*. Simply to offer the victim the option of moving to another job, while giving a letter of admonition or warning to his or her supervisor, will not be enough. More extensive measures well may be appropriate based on a consideration of the surrounding circumstances.

(3) In either of the above situations, labor counselors should not recommend action without considering both *Hillen* and *Julian* carefully. When deciding on a final disposition in any case, the decision should reflect consideration and application of the criteria contained in both cases.

#### Enhancement of Attorneys' Fees: No More?

In several decisions involving the award of attorneys' fees under federal fee-shifting statutes, the Supreme Court has attempted to guide lower courts in their determinations of two issues: which side in a contested case is the prevailing party, and what fees may be classified as reasonable. In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), Justice O'Connor, writing for the Court, stated that a plaintiff must receive actual relief that is more than a technical victory or a de minimus success to be considered a prevailing party. In *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware II*), a four-member plurality held that a multiplier, or enhancement, to compensate for a party's risk of loss is generally impermissible. The plurality emphasized that risk enhancements should be reserved for exceptional cases. If a risk enhancement is granted, it should be limited to no more than one third of the "lodestar"—a sum calculated by multiplying the hours the attorney reasonably expended by a reasonable hourly rate. The four dissenting justices maintained that risk enhancement should not be reserved for exceptional cases. Rather, compensa-

The idea of victims' compensation may seem foreign to military practitioners because, unlike restitution<sup>13</sup> or claims under article 139 of the Uniform Code of Military Justice,<sup>14</sup> victims' compensation damages are not paid to the victim by the convicted defendant or liable party. Instead, each state with a compensation program has a fund from which it pays crime victims for certain out-of-pocket expenses. These state funds, which often are financed through relatively small assessments against convicted criminals, essentially create an insurance fund from which victims are paid. Federal monies from the Crime Victims Fund supplement the state programs.<sup>15</sup>

"Crime victim[s]' compensation is a direct payment to a crime victim for out-of-pocket expenses incurred as a result of a violent crime ...."<sup>16</sup> Compensable expenses include medical bills; mental health counseling; funeral expenses; lost wages; and the costs of eyeglasses, contact lenses, dental work, and prosthetic devices.<sup>17</sup> Other expenses covered in some states include crime scene cleanup, moving and relocation expenses, transportation to obtain medical care, job rehabilitation, and replacement services for child care and domestic help. If a victim may seek compensation from other sources—such as the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), military benefits, or private insurance—state compensation may be available only to the extent that a gap exists in the coverage that these sources provide.<sup>18</sup>

Although each state administers its own victims' compensation program, state programs share many common requirements. For instance, most programs require a vic-

tim promptly to report the crime to the police—typically, within three days. A victim also must file his or her claims for compensation within a specific filing period and must cooperate with law enforcement efforts.<sup>19</sup> Failure to comply with these requirements may render a claimant ineligible for compensation. Most states, however, authorize exceptions to these rules, allowing claimants to extend reporting requirement deadlines for "good" or "reasonable" causes.<sup>20</sup> Each state sets its own dollar limits on compensation, and retains final approval authority over victims' compensation claims.<sup>21</sup> Finally, most states administer their victims' compensation programs from central offices.<sup>22</sup>

Victims of federal crimes must apply to the appropriate state or local offices for compensation. The federal government normally does not pay compensation directly to crime victims.<sup>23</sup> A state that receives federal money for its victims' compensation program must compensate eligible victims of federal crimes, including victims of offenses under the Uniform Code of Military Justice.<sup>24</sup>

Victims' assistance service programs are distinct from victims' compensation programs and are managed by separate offices. Victims' service programs offer many forms of social and medical assistance, including crisis intervention services, counseling, emergency transportation to court, victim and witness assistance, short-term child care services, domestic violence shelters, temporary housing, and victim protection.<sup>25</sup> Many of these programs should be familiar to legal assistance attorneys. Although some of these services are available to soldiers and their dependents through programs administered by the

<sup>13</sup> See 18 U.S.C.A. §§ 3663-3664 (West 1985 & Supp. 1991).

<sup>14</sup> Article 139 of the Uniform Code of Military Justice provides that a commanding officer may convene a board upon receiving a complaint of willful damage or a wrongful taking of property by a member of the armed forces. Uniform Code of Military Justice, art. 139, 10 U.S.C.A. § 939 (West 1983). The assessment of damages by the board, subject to approval by the commanding officer, shall be charged against the pay of the offenders. *Id.*

<sup>15</sup> Telephone Interview with Ms. Susan Shriner, Program Specialist, Office for Victims of Crime, Department of Justice (Nov. 6, 1991) [hereinafter Telephone Interview].

<sup>16</sup> Dep't of Justice, Office for Victims of Crime, Crime Victims Fund Fact Sheet at 3 (1991) [hereinafter Crime Victims Fact Sheet].

<sup>17</sup> 42 U.S.C.A. § 10,602(b)(1) (West Supp. 1991); Program Guidelines, *supra* note 8, 55 Fed. Reg. at 3183.

<sup>18</sup> Telephone Interview, *supra* note 15; see also Uniform Act, *supra* note 7, at 41-42; Crime Victims Fact Sheet, *supra* note 16, at 3.

<sup>19</sup> Crime Victims Fact Sheet, *supra* note 16, at 3. The reporting requirement is intended to encourage fresh information, which is essential to effective law enforcement.

<sup>20</sup> See Office for Victims of Crime, Dep't of Justice, Crime Victim Compensation: A Fact Sheet (1991) [hereinafter Fact Sheet]. Some states waive or extend time requirements for certain types of victims, such as children and victims of domestic violence. *Id.*

<sup>21</sup> *Id.*, see also Uniform Act, *supra* note 7, at 36-39.

<sup>22</sup> The Office for Victims of Crime has prepared a list of central agencies and offices of participating states which provide victim compensation, as well as victim assistance. This list may be obtained from the Criminal Law Division, Office of The Judge Advocate General (OTJAG), or Army Legal Assistance, OTJAG.

<sup>23</sup> Although most federal monies designated for crime victim compensation are administered by participating state agencies, the Office for Victims of Crime also has established a special Federal Crime Emergency Services Fund to provide direct emergency assistance to victims of federal crimes when other sources are not available. See Fact Sheet, *supra* note 20, at 1-2.

<sup>24</sup> See 42 U.S.C.A. §§ 10,602(b)(5), 10,604(f) (West Supp. 1991).

<sup>25</sup> Fact Sheet, *supra* note 20, at 5.

Department of Defense, many state and local programs have no counterparts on military installations. Judge advocates and VWLs must identify every available source of assistance if state, local, and military assistance programs are to work together, rather than work as separate entities.

The following hypothetical illustrates how a state compensation program can benefit soldiers: A soldier, his wife, and their three children are injured in a collision caused by a drunk driver and are taken by ambulance to a civilian hospital.<sup>26</sup> One child dies enroute. The survivors receive inpatient emergency hospital care and outpatient care for their injuries.

On behalf of the dependents, CHAMPUS will pay 100% of all allowed medical charges for inpatient care and eighty percent of allowed charges for outpatient care. Depending on the coverages of the insurance policies carried by the drunk driver and the soldier, the soldier may have to pay a significant medical bill. By filing an application for compensation, however, the soldier may be eligible for compensation for all of his out-of-pocket medical expenses and also may receive compensation for funeral expenses. Moreover, if the soldier's wife works, she may be entitled to compensation for lost wages and for the cost of any physical therapy she receives that is not covered by CHAMPUS. Finally, counseling may be available through the state office for victims' assistance. The types and amounts of compensation and assistance will vary according to the specific coverage offered by insurance, any damages obtained against the drunk driver, and the availability of on-post medical care.<sup>27</sup>

Staff judge advocates (SJAs) play important roles in the victims' assistance and compensation process. An

SJA not only must train judge advocates, law enforcement personnel, and social services providers within his or her general court-martial (GCM) jurisdiction,<sup>28</sup> but also must serve as the commander's honest broker, ensuring that the command makes its "best effort" to provide all victims of federal crimes with the assistance and protection to which they are entitled under the law.<sup>29</sup>

Staff judge advocates should ensure that victims of crimes that occur within their GCM jurisdictions are advised of their rights to apply for compensation.<sup>30</sup> This may require an SJA to coordinate with other federal agencies that investigate and prosecute violations of federal law and with state and local law enforcement officials.<sup>31</sup> If a local misunderstanding exists about the eligibility of soldiers or their dependents to receive victims' compensation, VWLs and legal assistance attorneys should contact the state office for victims' compensation. If they cannot resolve the problem at that level, they may contact the Office for Victims of Crime for assistance.<sup>32</sup>

State victims' compensation programs are available to soldiers, dependents, and federal employees who are victims of crimes of violence. Unfortunately, many eligible victims do not receive compensation or assistance because they never are advised that these benefits are available.<sup>33</sup> Military attorneys and VWLs can fill this void. Prior coordination with the appropriate state offices for victims' compensation and victims' assistance will enhance the opportunities of eligible victims to receive the help to which they are entitled. Lack of preparation and training in this area could cause eligible victims unknowingly to forfeit significant compensation.

<sup>26</sup>The collision could occur either on or off post without affecting the victims' eligibilities for compensation. See, e.g., 42 U.S.C.A. § 10,602(b)(4),(5) (West Supp. 1991).

<sup>27</sup>Most states provide compensation only to a victim who suffers a "direct" injury. See generally Program Handbook, *supra* note 7. "Secondary victim" coverage usually is limited to members of the immediate family and may require that the family member actually witness the crime. *Id.* Bodily injury is a frequent requirement. Some states define bodily injury to include emotional injury. *Id.* Most states do not, however, provide compensation for lost, stolen, or damaged property. *Id.* All states provide compensation for rape, sexual assault, and child abuse, whether or not bodily injury is suffered. *Id.*

<sup>28</sup>See AR 27-10, para. 18-5.

<sup>29</sup>See 42 U.S.C.A. 10,606 (West Supp. 1991).

<sup>30</sup>Every participating state has victim compensation application forms. Legal assistance offices and VWLs could provide a valuable service by making these forms available along with a fact sheet that explains the criteria for eligibility and the applicable time requirements for filing.

<sup>31</sup>See 42 U.S.C.A. § 10,602 (West Supp. 1991). See generally Crime Victims Fact Sheet, *supra* note 16.

<sup>32</sup>At the end of 1990, 44 states, the Virgin Islands, and the District of Columbia, were eligible to receive federal monies from the Crime Victims Fund. Five states—Mississippi, Georgia, Vermont, South Dakota, and New Hampshire—have new programs and will be eligible for federal crime victim funds in the near future. Maine is the only state without a crime victim compensation program. Refusal by any participating state to compensate federal victims of crime, to include soldiers and their dependents, would jeopardize its eligibility to receive federal grant money under the terms of the statute. See Program Guidelines, *supra* note 8, 55 Fed. Reg. at 3183; Crime Victims Fact Sheet, *supra* note 16, at 4. Additional information concerning this program may be obtained from the Office for Victims of Crime, 633 Indiana Avenue, N.W., Washington, D.C. 20531, telephone number (202) 307-5947.

<sup>33</sup>Failure to receive any of the rights set forth in the Victims' Bill of Rights does not confer standing upon a victim to enforce the rights created by statute. 42 U.S.C.A. 10,606(c) (West Supp. 1991); see also *Dix v. Humboldt County Super. Court*, 228 Cal. App. 3d 307, 267 Cal. Rptr. 88 (Cal. Ct. App. 1990).

# Professional Responsibility Notes

## OTJAG Standards of Conduct Office

### Ethical Awareness

The following case summaries, which describe the application of the Army's Rules of Professional Conduct for Lawyers<sup>1</sup> to actual professional responsibility cases, may serve not only as precedents for future cases, but also as training vehicles for Army lawyers, regardless of their levels of experience, as they ponder difficult issues of professional discretion.

To stress education and protect privacy, neither the identity of the office nor the subject involved in the case studies is published.

### Case Summaries

#### *Army Rule 1.1 (Competence);*

#### *Army Rule 3.1 (Meritorious Claims and Contentions)*

*An attorney who failed to review evidence sufficiently, failed to advise investigators of a missing element of proof, and attempted to obtain evidence in violation of a regulation committed ethical violations.*

Doctor X, a psychologist who had been dismissed from his position as a civilian Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) officer, complained in a letter to The Judge Advocate General that he had "experienced personal difficulties" with the local Criminal Investigation Command (CID) office over a five-year period because of his repeated refusals to release positive urine specimens. He asserted that an Army attorney and a CID agent once improperly requested a search warrant to obtain specimens even after he showed the attorney the governing regulation, which indicated that the specimens could not be released for military justice purposes.

Doctor X's difficulties with the CID increased after local CID agents, acting on the advice of the Army attorney, titled him in an investigation into allegations that he had provided false information on his Standard Form 171, Personal Qualification Statement, about his two mail-order postgraduate degrees.<sup>2</sup> The CID later opened another investigation on the Army attorney's

advice, this time looking into Dr. X's foreign living quarters allowance claims. This investigation ultimately constituted the basis for Dr. X's removal from government service.

Because the attorney not only failed to review the ADAPCP regulation exempting the release of certain urine specimens to criminal investigators, but also aided an investigator in making a frivolous request for a search warrant, he violated Army Rule 3.1 regarding meritorious claims and contentions.<sup>3</sup> The attorney also committed two violations of Army Rule 1.1, regarding competent representation. The attorney's failure carefully to compare Dr. X's LQA entitlements with various applications and payment documents was the first shortcoming.<sup>4</sup> The second deficiency arose when the attorney failed to advise the CID that Dr. X's public use of the two postgraduate degrees was not actionable unless Dr. X actually knew that the institution from which he graduated lacked the authority to grant degrees. The attorney's inadequate review and inaccurate advice amounted to incompetent representation.

The supervisory judge advocate concurred with the preliminary screening official's (PSO's) finding of minor, technical violations and directed the attorney's staff judge advocate (SJA) to counsel him orally.

#### *Army Rule 1.13 (Army as Client);*

#### *Army Rule 4.1 (Truthfulness in Statements to Others);*

#### *Army Rule 8.4 (Misconduct)*

*Even though he was precluded by regulation from acting as individual military counsel (IMC), a command judge advocate who obtained his commander's permission to enter into an attorney-client relationship with a soldier, erroneously—but unintentionally—referred to himself as an IMC, and made intemperate remarks in arguing the soldier's case was found not to have committed any ethical violations.*

An Army attorney, serving as the principal legal advisor of an organization, was contacted by friends within the local CID office. They told him that another

<sup>1</sup>Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter DA Pam 27-26].

<sup>2</sup>Years earlier, Dr. X had been investigated for misrepresenting his educational background, especially his two mail-order postgraduate psychology degrees from a West Coast university that had lost its state accreditation. The CID had not pursued the matter, however, because at one time the university actually had been state-accredited.

<sup>3</sup>An Army lawyer whose counsel is sought regarding improper activities, such as discovering confidential urinalysis results, can find helpful guidance in Army Rule 1.13(b), DA Pam 27-26, which states, in part:

(b) If a lawyer for the Army knows that an officer, employee, or other member associated with the Army is engaged in action, intends to act or refuses to act in a matter related to the representation that is either a violation of a legal obligation to the Army or a violation of law which reasonably might be imputed to the Army the lawyer shall proceed as is reasonably necessary in the best interest of the Army.

<sup>4</sup>The attorney incorrectly identified the LQA overpayment as \$4244.55, rather than \$8750.19, and also failed to correct the error in his review of the evidence.

#### 4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

#### 5. The Army Law Library System

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Tele-

phone numbers are DSN 274-7115, ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the libraries directly at the addresses provided below.

Staff Judge Advocate, HQ USA Support Command, Hawaii,  
Attn: Carolyn Parmley, Dunning Hall, Fort Shafter, Hawaii  
96858-500; telephone (808) 438-6723.

Federal Supplement, vols. 225-279

Federal Reporter, vols. 390-444

Staff Judge Advocate, HQ 7th Inf. Div. (Light) & Fort Ord,  
Attn: CW3 Perdue, Fort Ord, CA 93941; telephone (408)  
242-2422 or DSN 929-2422.

Federal Reporter, vols. 188-239; 241; 244-305; 307-354;  
356-684; 687-846

Federal Supplement, vols. 1-35; 123-204; 221-356; 368-  
466; 471-491

California Reporter, vols. 148-163; 172-173; 175-179; 181-  
198; 200-215

Supreme Court Reporter, vols. 1-11; 13-65; 69-72; 74-  
100A; 102-107A

\*U.S. Government Printing Office: 1993 — 341-976/80001

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1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Lichtenthaler and Whistler (1973).

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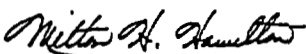
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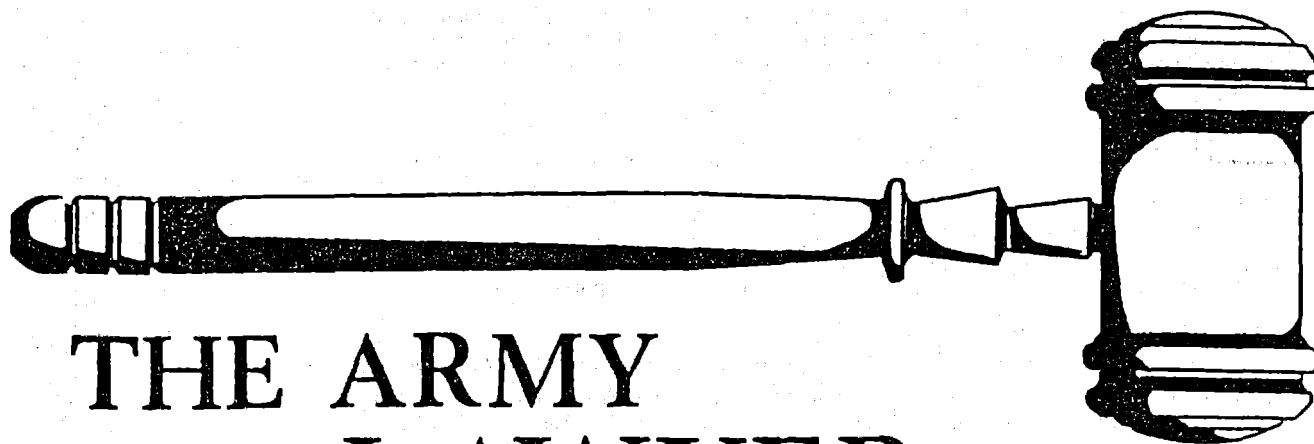
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# THE ARMY LAWYER

Headquarters, Department of the Army

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Department of the Army Pamphlet 27-50-232

March 1992

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### Editor

Captain Benjamin T. Kash

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# The Civil Rights Act of 1991

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## Introduction

On November 21, 1991, President George Bush signed the Civil Rights Act of 1991.<sup>1</sup> This new legislation was designed to strengthen the barriers and sanctions against employment discrimination<sup>2</sup> and to respond to the recent Supreme Court decision in *Wards Cove Packing Co. v. Atonio*.<sup>3</sup> It significantly altered two federal discrimination statutes—the Civil Rights Act of 1964 (Title VII) and the Rehabilitation Act of 1973.<sup>4</sup> Noticeably absent from the new legislation, however, was any substantive change to the Age Discrimination in Employment Act (ADEA).<sup>5</sup>

Most important from a federal defensive litigation perspective, the new legislation altered the law of disparate impact. It provides for additional remedies and—in some circumstances—a jury trial in suits against the United States, increases the statutory time limit for filing suit, and alters the “mixed motive” defense. Army attorneys can expect litigation to increase as the courts struggle to determine the legislation’s limitations and its applicability to the federal government.<sup>6</sup> Furthermore, the Act increases the financial incentive for plaintiff’s

attorneys to take discrimination cases<sup>7</sup> and reduces the incentive for settlement,<sup>8</sup> which will lead to further delays in bringing cases to trial.<sup>9</sup>

This article does not address all the provisions of the Civil Rights Act of 1991. Instead, it focuses on only those provisions that impact directly on discrimination complaints against the Army. The author will highlight the salient provisions of the new legislation and will attempt to clarify its parameters.

## Damages

Before the enactment of the Civil Rights Act of 1991, federal employees could not recover compensatory or punitive damages in a Title VII<sup>10</sup> or handicap discrimination suit.<sup>11</sup> In the 1991 Act, Congress maintained the prohibition against punitive damages,<sup>12</sup> but cracked the door ajar to recovery of compensatory damages.

Federal employees suing under Title VII<sup>13</sup> or the Rehabilitation Act of 1973<sup>14</sup> now may recover up to \$300,000<sup>15</sup> in compensatory damages for “future pecuni-

<sup>1</sup>Pub. L. 102-166, 105 Stat. 1071. The Senate passed the new legislation on October 30, and the House passed the Senate bill on November 7. 137 Cong. Rec. S15,503 (daily ed. Oct. 30, 1991); *id.* at H9557 (daily ed. Nov. 7, 1991).

<sup>2</sup>George H.W. Bush, Statement by the President (Nov. 21, 1991).

<sup>3</sup>490 U.S. 642 (1989); *see* Civil Rights Act of 1991 § 3, 105 Stat. at 1071.

<sup>4</sup>42 U.S.C. §§ 2000e to 2000e-17 (1988); 29 U.S.C. §§ 791, 794a.

<sup>5</sup>29 U.S.C. §§ 621-634 (1988). The 1991 Civil Rights Act’s only change to the ADEA requires the Equal Employment Opportunity Commission to notify a complainant when a charge is dismissed or otherwise terminated. The complainant then may bring suit within 90 days of receiving this notice. 1991 Civil Rights Act § 115, 105 Stat. at 1079.

<sup>6</sup>*See* Ingwersen, *New Civil Rights Law Bears Seeds of Controversy*, The Christian Science Monitor, Nov. 21, 1991, at 1, col. 4 (“Politicians left a lot of room for argument in the 1991 civil rights bill”); *cf.* Crovitz, *Bush’s Quota Bill’s (Dubious) Politics Trumps Legal Principle*, Wall St. J., Oct. 30, 1991 (“ensures years of costly lawsuits as judges try to fathom what Congress meant by a bill that intentionally doesn’t say what it means”) *reprinted* in 137 Cong. Rec. S15,492 (daily ed. Oct. 30, 1991).

<sup>7</sup>*Cf.* *Increase Predicted in Maryland Harassment Cases*, Wash. Post, Nov. 29, 1991, at C7, col. 5 (“Private attorneys should be more willing to take these cases’ because of the monetary damages available”).

<sup>8</sup>“[H]uge monetary award amounts are encouraged through jury trials, eliminating any incentive for the plaintiff and defendant to settle early. And with legal and expert fees allowed, there is no incentive for the lawyer to settle either.” 137 Cong. Rec. S15,468 (daily ed. Oct. 30, 1991) (statement of Sen. Symms).

<sup>9</sup>*Id.* at S15,463 (statement of Sen. Kassebaum) (“additional damages and jury trials will lead to further delays ... it may take five years or longer to complete a jury trial under this bill”); *cf. id.* at S15,483 (statement of Sen. Simpson) (expressing concern that trial attorneys will prolong litigation needlessly to increase fees).

<sup>10</sup>*Grace v. Rumsfield*, 614 F.2d 796 (1st Cir. 1990); *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977); *Smith v. Office of Personnel Management*, 778 F.2d 258 (5th Cir. 1985); *Boddy v. Dean*, 821 F.2d 346 (6th Cir. 1987); *Espinueva v. Garrett*, 895 F.2d 1164, 1165 (7th Cir. 1990); *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982); *Bruni v. United States*, 56 Fair Empl. Prac. Cas. (BNA) 601 (D. Mass. 1991).

<sup>11</sup>*Mack A. Player*, Employment Discrimination Law § 7.16, at 609 (1988). Federal employees are limited to remedies authorized by section 717 of Title VII. *Id.* at 608; *cf. Eastman v. V.P.I.*, 56 Fair Empl. Prac. Cas. (BNA) 717 (4th Cir. 1991); *Turner v. First Hosp. Corp. of Norfolk*, 772 F. Supp. 284 (E.D. Va. 1991); *Americans Disabled for Accessible Pub. Transp. (ADAPT), Salt Lake Chapter v. Skywest Airlines, Inc.*, 762 F. Supp. 320 (D. Utah 1991); *Jenkins v. Skinner*, 56 Fair Empl. Prac. Cas. (BNA) 1125 (E.D. Va. 1991).

<sup>12</sup>A party may not recover punitive damages against “a government, government agency, or political subdivision.” Civil Rights Act of 1991 § 102, 105 Stat. 1073 (to be codified at 42 U.S.C. § 1981a(b)(1)).

<sup>13</sup>*Id.*, 105 Stat. 1072 (to be codified at 42 U.S.C. § 1981a(a)(1)).

<sup>14</sup>*Id.* (to be codified at 42 U.S.C. § 1981a(a)(2)).

<sup>15</sup>*Id.*, 105 Stat. at 1073 (to be codified at 42 U.S.C. § 1981a(b)(3)(D)). The jury shall not be informed of the damages limitation. *Id.* (to be codified at 42 U.S.C. § 1981a(c)(2)).

ary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other pecuniary damages."<sup>16</sup> In addition to this recovery, a plaintiff may seek other remedial relief, such as back pay, interest on back pay, or other relief authorized under Title VII;<sup>17</sup> however, the court may reduce the plaintiff's final award if the court deems it to be excessive.<sup>18</sup> The damages limitation applies to each complaining party when multiple plaintiffs have filed suit in a single case.<sup>19</sup> The new legislation specifically prohibits awards of compensatory damages in disparate impact cases<sup>20</sup> and in Rehabilitation Act cases in which the defendants have made a good-faith effort reasonably to accommodate a handicapped employee.<sup>21</sup>

### Jury Trial

Plaintiffs formerly had no right to a jury trial in a suit brought under Title VII<sup>22</sup> or the Rehabilitation Act.<sup>23</sup> A plaintiff now may demand a trial by jury, however, if he or she seeks compensatory damages.<sup>24</sup> Because the 1991 Civil Rights Act links a plaintiff's right to a jury trial to the recovery of compensatory damages, jury trials are unavailable in disparate impact trials.

The Act is unclear whether the jury may decide all issues or may rule upon only the issue of damages. Because the right to a jury trial is predicated upon the

right to compensatory damages, the jury's function arguably should be limited to deciding the amount—if any—of damages due the plaintiff.

Cases in which issues of liability and damages are tried and determined separately commonly are referred to as "bifurcated" trials.<sup>25</sup> A growing number of jurisdictions permit the issue of liability on the merits to be tried separately from the issue of damages.<sup>26</sup> In the federal sector, Federal Rule of Civil Procedure 42(b) expressly permits bifurcated trials;<sup>27</sup> federal courts, therefore, may bifurcate cases that arise under civil rights causes of action.<sup>28</sup> The rule also permits separation of jury and nonjury issues<sup>29</sup> and separate trials on the issue of a defendant's liability in damages.<sup>30</sup> The decision to separate the issues of liability and damages is within the sound discretion of the trial judge and, absent a showing of prejudice, the judge's decision will not be reversed on appeal.<sup>31</sup> Because an order granting or denying separate trials normally is nonappealable and interlocutory, it may be reviewed only upon entry of a final order or judgment.<sup>32</sup>

Bifurcated trials offer a number of advantages in discrimination cases. Separating the issues of liability and damages avoids prejudice to the defendant by postponing the jury's consideration of evidence of injuries—which often is relevant only to the issue of damages—until liability has been found.<sup>33</sup> Moreover, bifurcation promotes

<sup>16</sup> *Id.* (to be codified at 42 U.S.C. § 1981a(b)(3)).

<sup>17</sup> *Id.* (to be codified at 42 U.S.C. § 1981a(b)(2)).

<sup>18</sup> 137 Cong. Rec. S15,484 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth); cf. 22 Am. Jur. 2d *Damages* § 1022, at 1070 n.89 (1988) (federal appellate courts normally will not disturb a civil jury award unless it is "grossly excessive or shocking to conscience") (citing *La Forest v. Autoridad de Las Fuentes Fluviales*, 536 F.2d 443 (1st Cir. 1976)). See generally 22 Am. Jur. 2d *Damages* §§ 1017-1027 (1988).

<sup>19</sup> 1991 Civil Rights Act § 102, 105 Stat. at 1073 (to be codified at 42 U.S.C. § 1981a(b)(3)) (setting precise limits on recovery of "compensation ... and punitive damages ... for each complaining party") (emphasis added); see also 137 Cong. Rec. S15,471 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy).

<sup>20</sup> 1991 Civil Rights Act § 102, 105 Stat. at 1072 (to be codified at 42 U.S.C. § 1981a(a)(1), (2) (denying recovery for any "employment practice that is unlawful because of its disparate impact").

<sup>21</sup> *Id.* (to be codified at 42 U.S.C. § 1981a(a)(3); see also 137 Cong. Rec. S15,467 (daily ed. Oct. 30, 1991) (statement of Sen. Dodd); *id.* at S15,485 (statement of Sen. Kennedy).

<sup>22</sup> *Lehman v. Nakshian*, 453 U.S. 156, 164, 168-69 (1981) ("there is no right to trial by jury in cases arising under Title VII"); *Wilson v. City of Aliceville*, 779 F.2d 631 (11th Cir. 1986); *Trotter v. Todd*, 719 F.2d 346 (10th Cir. 1983); *Harmon v. May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978) (no right to jury trial in Title VII suit); *Giles v. Equal Employment Opportunity Comm'n*, 520 F. Supp. 1198, 1200 (E.D. Mo. 1981) ("jury trials are not a matter of right in a Title VII cause of action").

<sup>23</sup> *Smith v. Barton*, 914 F.2d 1330 (9th Cir. 1990); *Ahonen v. Frank*, 56 Fair Empl. Prac. Cas. (BNA) 1296 (E.D. Wisc. 1991); *Jenkins v. Skinner*, 56 Fair Empl. Prac. Cas. (BNA) 1125 (E.D. Va. 1991); *Giles v. Equal Employment Opportunity Comm'n*, 520 F. Supp. 1198, 1200 (E.D. Mo. 1981). Moreover, plaintiffs have no right to a jury trial in age discrimination suits. *Lehman v. Nakshian*, 453 U.S. 156, 168-69 (1981); *Attwell v. Granger*, 748 F. Supp. 866 (N.D. Ga. 1990); *Grandison v. United States Postal Serv.*, 54 Fair Empl. Prac. Cas. (BNA) 1323 (S.D.N.Y. 1988); *Giles*, 520 F. Supp. at 1200.

<sup>24</sup> 1991 Civil Rights Act § 102, 105 Stat. at 1073 (to be codified at 42 U.S.C. § 1981a(c)); see also 137 Cong. Rec. S15,460 (daily ed. Oct. 30, 1991) (statement of Sen. Mikulski) ("possible for a jury to award compensatory damages to Federal employees").

<sup>25</sup> 74 Am. Jur. 2d *Trial* § 140, at 351 (1991).

<sup>26</sup> *Id.* (citations omitted).

<sup>27</sup> *Id.* at 352-53.

<sup>28</sup> *Id.* at § 142, at 354 (citing *Barnell v. Paine Webber Jackson & Curtis, Inc.*, 577 F. Supp. 976 (S.D.N.Y. 1983); *Equal Employment Opportunity Comm'n v. Lucky Stores*, 37 Fed. R. Serv. 2d 333 (E.D. Cal. 1982)). See generally Eunice A. Eichelberg, Annotation, *Propriety of Ordering Separate Trials as to Liability and Damages, Under Rule 42(b) of Federal Rules of Civil Procedure, in Civil Rights Actions*, 79 A.L.R. Fed. 220 (1986).

<sup>29</sup> 5 James W. Moore et al., *Moore's Federal Practice* ¶ 42.03(1), at 42-46 (2d ed. 1988) (citations omitted).

<sup>30</sup> *Id.* at 42-59 (citations omitted).

<sup>31</sup> 75 Am. Jur. 2d *Trial* § 140, at 351 (1991); 5 Moore et al., *supra* note 29, ¶ 42.03(3), at 42-68 ("will not be upset except for an abuse of discretion") (citations omitted). In the Third Circuit, however, a decision to bifurcate may be subject to reversal without a showing of prejudice if the trial judge fails to demonstrate on the record the exercise of an informed decision on the matter. See 75 Am. Jur. 2d *Trial* § 141, at 353 (1991).

<sup>32</sup> 5 Moore et al., *supra* note 29, ¶ 42.03(3), at 42-68.

<sup>33</sup> 75 Am. Jur. 2d *Trial* § 141, at 353 (1991).

judicial economy and a speedier resolution of the case. If no liability is found, no evidence must be presented on the issue of damages.<sup>34</sup> When a trial judge would determine the issue of liability, to bifurcate the trial would permit the court to avoid the burden of impaneling a jury when no need for one exists. Indeed, some federal courts already have ordered separate trials on the issues of liability and damages with a view toward holding settlement conferences after making findings of liability, but before the issues of damages are tried.<sup>35</sup>

### Prejudgment Interest

Before Congress enacted the Civil Rights Act of 1991, the vast majority of courts held that prejudgment interest was not available against the United States under Title VII.<sup>36</sup> The few courts to hold otherwise did so only after finding a limited waiver of sovereign immunity for prejudgment interest in the 1987 amendments to the Back Pay Act.<sup>37</sup> Even under this limited waiver theory, a court could not award prejudgment interest in employment actions involving the discriminatory failure to hire<sup>38</sup> or to promote because these actions do not involve the "withdrawal or reduction" of compensation.<sup>39</sup>

Whether through inadvertence or political compromise, the language of the Act failed to alter existing law materially in this area. Although it specifically waives sovereign immunity for *postjudgment* interest,<sup>40</sup> the Act

contains no express waiver for prejudgment interest and no such waiver can be gleaned from its legislative history. Assuming *arguendo* that the legislation's drafters actually intended to permit this relief,<sup>41</sup> prejudgment interest nevertheless cannot be recovered in a suit against the United States, absent an express waiver of federal sovereign immunity.<sup>42</sup>

### Expert Fees

Overtaking *West Virginia University Hospital v. Casey*,<sup>43</sup> the new legislation specifically amended Title VII to include expert fees in the award of attorney fees.<sup>44</sup> A prevailing party now may recover "expert fees" as part of his or her "reasonable attorney fees."<sup>45</sup> Unfortunately, the Act poorly defines the parameters of the expert fee award. The drafters apparently intended this provision to permit the prevailing party to recover a "reasonable" fee only for an expert witness.<sup>46</sup> A party therefore should not recover fees for experts that assist in the preparation of the case, but do not testify. The provision, however, permits a prevailing party to recover for all pretrial work performed by an expert witness.<sup>47</sup>

This provision also limits the prevailing party's recovery to "reasonable" expert fees.<sup>48</sup> The expert fee award should not "exceed the amount actually paid to the expert, or the going rate for such work, whichever is lower."<sup>49</sup> Because the expert fee award is part of plain-

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Library of Congress v. Shaw*, 478 U.S. 310 (1986); *Cross v. United States Postal Serv.*, 733 F.2d 1327 (8th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *Blake v. Califano*, 626 F.2d 891 (D.C. Cir. 1980); *Saunders v. Claytor*, 629 F.2d 596 (9th Cir. 1980); *De Weever v. United States*, 618 F.2d 685 (10th Cir. 1980); *Fischer v. Adams*, 572 F.2d 406 (1st Cir. 1978); *Richerson v. Jones*, 551 F.2d 918 (3rd Cir. 1977).

<sup>37</sup> 5 U.S.C. § 5596 (1988); *see also Brown v. Secretary of the Army*, 918 F.2d 214 (D.C. Cir. 1990); *Smith v. Brady*, 774 F. Supp. 925 (N.D. Cal. 1990); *Lee v. Brady*, 741 F. Supp. 990 (D.D.C. 1990); *Hearn v. Turnage*, 739 F. Supp. 1312 (E.D. Wisc. 1990).

<sup>38</sup> *Wrenn v. Secretary, Dep't of Veterans' Affairs*, 918 F.2d 1073, 1077 (2d Cir. 1990), *cert. denied* 111 S. Ct. 1625 (1991) (Back Pay Act's provisions "apply only to agency employees, not to job applicants").

<sup>39</sup> *Brown*, 918 F.2d at 218 (failure to promote involved no "withdrawal or reduction of all or part of [the plaintiff's] compensation"); *Lee*, 741 F. Supp. at 991 ("failure to promote [is] ... a 'personnel action' not covered by the Back Pay Act."); *Mitchell v. Secretary of Commerce*, 715 F. Supp. 409, 411 (D.D.C. 1989); *see also Hearn*, 739 F. Supp. at 1313 (Back Pay Act permits a claim for prejudgment interest "only when the agency withdrew or reduced an employee's pay, not when the agency denies a promotion").

<sup>40</sup> Section 114 of the Act amends 42 U.S.C. § 2000e-16(d) to make the United States liable for "the same interest to compensate for delay in payment ... as in cases involving nonpublic parties." Civil Rights Act of 1991 § 114, 105 Stat. at 1079; *see* 137 Cong. Rec. S15,477 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond); *see also George H.W. Bush, Statement by the President* (Nov. 21, 1991) ("expert witness fees"); 137 Cong. Rec. S15,235 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy) ("expert witness costs"); *id.* at H9539 (daily ed. Nov. 7, 1991) (statement of Rep. Clay) ("expert witness fees"). Absent a waiver of sovereign immunity, postjudgment interest is not recoverable against the United States. *Thompson v. Kennickell*, 41 Fair Empl. Prac. Cas. (BNA) 1435, 1436-37 (D.C. Cir. 1986); *Miles v. Bolger*, 546 F. Supp. 375, 377 (E.D. Cal. 1982).

<sup>41</sup> *But see Mitchell*, 715 F. Supp. at 411 n.5 ("[n]or can an intent on the part of the framers of a statute ... to permit the recovery of interest suffice where the intent is not transformed into affirmative statutory or contractual terms") (citing *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 659 (1947)).

<sup>42</sup> *Shaw*, 478 U.S. at 311.

<sup>43</sup> 111 S. Ct. 1138 (1991). In *Casey*, the Supreme Court held that expert witness fees could not be shifted to the losing party as part of an award of attorney fees pursuant to 42 U.S.C. § 1988. *See id.* at 1139, 1148.

<sup>44</sup> *See* Civil Rights Act of 1991 § 113(b), 105 Stat. at 1079.

<sup>45</sup> *See id.* (amending 42 U.S.C. § 2000e-5(k)).

<sup>46</sup> 137 Cong. Rec. S15,477 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond); *see also George H.W. Bush, Statement by the President* (Nov. 21, 1991) ("expert witness fees"); 137 Cong. Rec. S15,235 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy) ("expert witness costs"); *id.* at H9539 (daily ed. Nov. 7, 1991) (statement of Rep. Clay) ("expert witness fees").

<sup>47</sup> 137 Cong. Rec. S15,477 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond) ("provision is intended to allow recovery for work done in preparation for trial as well as after the trial has begun").

<sup>48</sup> *Id.* ("[i]n exercising its discretion, the court should ensure that fees are kept within reasonable bounds").

<sup>49</sup> *Id.*

tiff's reasonable attorney fees, case law defining attorney fee awards should apply equally well to the costs of experts.

### Disparate Impact

The new legislation dramatically changed the employer's burden of proof in disparate impact cases.<sup>50</sup> Under *Wards Cove Packing Co. v. Atonio*,<sup>51</sup> the plaintiff initially had to identify a specific employment practice that resulted in a disparate impact on a protected Title VII class.<sup>52</sup> Only then did the defendant assume the burden of producing evidence of a "business justification" for the challenged practice.<sup>53</sup> If the employer successfully presented a business necessity defense, the plaintiff still could prevail by persuading the trier of fact that "other tests or selection devices, without a similarly undesirable racial effect," were available and that the employer had used the challenged device as a pretext for discrimination.<sup>54</sup> Regardless of the legal theory, however, in a disparate impact case the plaintiff always retained the ultimate burden of persuasion.<sup>55</sup>

The Act does not change the plaintiff's specificity and causation requirements;<sup>56</sup> however, it shifts a portion of the burden of proof to the defendant, requiring him or her to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."<sup>57</sup> Significantly, the Act's drafters intentionally failed to define the terms "job related" or "business necessity" as they strove to attain political compromise.<sup>58</sup>

An exception to the specificity requirement now exists when a plaintiff demonstrates to the court that the elements of an employer's "decisionmaking process are not capable of separation for analysis." The entire process then may be analyzed as a single employment practice.<sup>59</sup> This exception does not apply if the process of separation is merely difficult or expensive.<sup>60</sup>

A plaintiff also may establish liability under a disparate impact theory by proving the availability of a less discriminatory alternative employment practice that the defendant has refused to adopt.<sup>61</sup> The alternative practice should be comparable in cost and equally effective in

<sup>50</sup>For a developmental discussion of the law of disparate impact, see generally Dean C. Berry, *The Changing Face Of Disparate Impact*, 125 Mil. L. Rev. 1 (1989).

<sup>51</sup>109 S. Ct. 2115 (1989); see also *Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

<sup>52</sup>*Wards Cove Packing Co.*, 109 S. Ct. at 2124-25.

<sup>53</sup>*Id.* at 2126.

<sup>54</sup>*Id.* at 2126 (citing *Watson v. Fort Worth Nat'l Bank*, 108 S. Ct. 2777, 2781 (1988); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)); see also *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). The Supreme Court first announced the alternative employment practice analysis in *Albemarle Paper Co.* See Berry, *supra* note 50, at 13.

<sup>55</sup>*Wards Cove Packing Co.*, 109 S. Ct. at 2126; see also *Watson*, 108 S. Ct. at 2790 (plurality opinion). But see *Watson*, 108 S. Ct. at 2792 (Blackmun, J., concurring). After the Court's decisions in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in *Albemarle Paper*, the employer actually assumed the burden of proof once plaintiff established a prima facie case. See Berry, *supra* note 50, at 13, 44-45 (citing *Albemarle Paper Co.*, 422 U.S. at 425). Not until *Watson* did the Court first indicate that the employer acquired only the burden of persuasion, with plaintiff always retaining the ultimate burden of proof. *Id.* at 44 (citing *Watson*, 108 S. Ct. at 2790).

<sup>56</sup>Civil Rights Act of 1991 § 105(a), 105 Stat. at 1074 (adding subsection (k)(1)(A)(i) to 42 U.S.C. § 2000e-2 (1988)); see also 137 Cong. Rec. S15,237 (daily ed. Oct. 25, 1991) (statement of Sen. Hatch) (the requirement that the plaintiff "identify the particular business practice causing the disparity in a disparate impact case has been preserved"); *id.* at S15,474 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond) (the new legislation "always requires the complaining party to demonstrate 'that the respondent uses a particular employment practice that causes disparate impact'"); *id.* at S15,484 (statement of Sen. Danforth).

<sup>57</sup>Civil Rights Act of 1991 § 105(a), 105 Stat. at 1074 (adding subsection (k)(1)(A)(i) to 42 U.S.C. § 2000e-2 (1988)); see 137 Cong. Rec. S15,498 (daily ed. Oct. 30, 1991) (statement of Sen. Hatch) ("the employer must come forward and meet the burden not only of production ... but the burden of persuasion as well").

<sup>58</sup>See Ingwersen, *supra* note 6, at 2, col. 2 ("to win passage, the bill had to blur a key point by avoiding a clear definition of how business can justify job requirements that end up discriminating by race or sex"); 137 Cong. Rec. S15,241 (daily ed. Oct. 25, 1991) (statement of Sen. Gorton) (the Act "does not attempt to further define the terms 'job related' or 'business necessity'"); *id.* at S15,463 (daily ed. Oct. 30, 1991) (statement of Sen. Kassebaum) ("the definition of business necessity is now left undefined"); *id.* at S15,486 (statement of Sen. Kohl) ("business necessity" is not defined ... [but the Act] does reference business necessity concepts as they are discussed in *Griggs*"); cf. Gray, *Civil Rights: We Won, They Capitulated*, Wash. Post., Nov. 14, 1991, at A3, col. 2, 3 ("On the contentious issue of 'business necessity,' which defines the standard that employers must meet in justifying statistical disparities, the proposal used essentially meaningless language from the Americans with Disabilities Act [of 1990, Pub. L. No. 101-336, 104 Stat. 327] that left the term in question undefined").

<sup>59</sup>Civil Rights Act of 1991 § 105(a), 105 Stat. 1074 (adding subsection (k)(1)(B)(i) to 42 U.S.C. § 2000e-2); see also 137 Cong. Rec. S15,484 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth).

<sup>60</sup>137 Cong. Rec. S15,474 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond). The exception does not apply when an employer fails to maintain pertinent personnel records. *Id.* Moreover, the expense of utilizing multiple regression analysis to separate the elements of the decision making process does not trigger the specificity exception. *Id.*; cf. Berry, *supra* note 50, at 44 (multiple regression analysis is equally available to both parties). Senator Danforth opined that this exception would apply when an employer's decisionmakers cannot reconstruct the basis of the employment decision because they possessed unfettered discretion in the decision making process. 137 Cong. Rec. S15,484 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth) (citing *Sledge v. J.P. Stevens & Co.*, 52 Empl. Prac. Dec. (CCH) ¶ 39,537 (E.D.N.C. Nov. 30, 1991)).

<sup>61</sup>Civil Rights Act of 1991 § 105(a), 105 Stat. 1074 (adding subsection (k)(1)(A) to 42 U.S.C. § 2000e-2 (1988)); see also Note, *Civil Rights Act of 1991*, Lab. Rel. Rep. (BNA) Supp. to No. 11, at S-1 (Nov. 11, 1991); 137 Cong. Rec. S15,473 (daily ed. Oct. 30, 1991).

achieving the employer's legitimate business goals.<sup>62</sup> The Act specifically mandates that only law existing on June 4, 1989—the day before the Supreme Court decided *Wards Cove Packing Co.*—may be applied in alternative employment practice cases.<sup>63</sup>

The Act limits the legislative history that the courts may apply to interpret “any provision of this Act that relates to *Wards Cove*—Business necessity/cumulation/alternative business practice” to the interpretative memorandum appearing in the October 25, 1991, *Congressional Record*.<sup>64</sup> That statement provides:

The terms “business necessity” and “job related” are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.<sup>65</sup>

Because the Supreme Court never has provided lower courts with a precise definition of “business necessity,”<sup>66</sup> this issue remains a fertile ground for advocacy. In *Griggs v. Duke Power Co.*,<sup>67</sup> the Court merely sug-

gested that the defendant's employment device should have a “manifest relationship to the employment in question.”<sup>68</sup> Later, in *Albemarle Paper Co. v. Moody*,<sup>69</sup> the Court expounded on its view of business necessity, requiring a close nexus between the challenged employment device and actual job performance,<sup>70</sup> and holding that even a validated employment test could be found to be a pretext for discrimination.<sup>71</sup>

In *Dothard v. Rawlinson*,<sup>72</sup> the Court rejected the Alabama Board of Correction's minimum height and weight requirements for its prison guards. It held that these requirements had a disparate impact on women, noting that the defendant had failed to correlate a job applicant's size with the requisite amount of physical strength essential for effective job performance.<sup>73</sup> The Court opined that the defendant's job requirements could not be considered legitimate if alternative tests were available that would serve the defendant's business purposes equally well without producing a discriminatory impact on a protected class.<sup>74</sup>

Although the concept of business necessity is flexible<sup>75</sup> and only partially defined, the “business necessity” standard appears to contain three requirements: (1) a substantial employer interest; (2) a factually supported, close or manifest relationship between the challenged employment practice and the employer's interest; and (3) the absence of any alternative practice that would serve the employer equally well without a concomitant discriminatory effect.<sup>76</sup>

<sup>62</sup> 137 Cong. Rec. S15,476 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond) (citing *Watson v. Fort Worth Nat'l Bank*, 108 S. Ct. 2777, 2790 (1988)).

<sup>63</sup> Civil Rights Act of 1991 § 105(a), 105 Stat. at 1074 (adding subsection (k)(1)(C) to 42 U.S.C. § 2000e-2 (1988)).

<sup>64</sup> *Id.* § 105(b), 105 Stat. at 1075.

<sup>65</sup> 137 Cong. Rec. S15,276 (daily ed. Oct. 25, 1991).

<sup>66</sup> *Player*, *supra* note 11, § 5.41(c), at 367.

<sup>67</sup> 401 U.S. 424 (1970).

<sup>68</sup> *Id.* at 432; *see also Player*, *supra* note 11, at 367.

<sup>69</sup> 422 U.S. 405 (1975).

<sup>70</sup> *Player*, *supra* note 11, at 367; *see Albemarle Paper Co.*, 422 U.S. at 426-36; *cf. Connecticut v. Teal*, 457 U.S. 440, 451 (1982) (requiring written test to be “related to effective performance”).

<sup>71</sup> 422 U.S. at 436.

<sup>72</sup> 433 U.S. 321 (1977).

<sup>73</sup> *Id.* at 331-32.

<sup>74</sup> *Id.* at 332; *Player*, *supra* note 11, at 368. In a decision not fully embraced by the lower courts, the Supreme Court, in *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), implicitly adopted a relaxed rationality standard for business necessity. The Court opined that a Transit Authority (TA) rule excluding methadone users from employment, which had a disparate impact on minorities, “significantly served” TA's legitimate employment goals of safety and efficiency, even if its broad exclusionary authority excluded employees from positions for which they were qualified. *Id.* at 587 n.31.

<sup>75</sup> *Player*, *supra* note 11, at 368; *cf. Albemarle Paper Co.*, 422 U.S. at 427 (“question of job relatedness must be viewed in the context of the [employer's] operation and the history of the [challenged practice].”).

<sup>76</sup> *Player*, *supra* note 11, at 368 (citing *Crawford v. Western Elec. Co.*, 745 F.2d 1373 (11th Cir. 1984); *Williams v. Colorado Springs Sch. Dist. No. 11*, 641 F.2d 835 (10th Cir. 1981)).

Also unaffected by the new legislation is the holding in *Wards Cove Packing Co.* that a mere statistical imbalance in a defendant's workforce does not establish a prima facie case of discrimination.<sup>77</sup> In a disparate impact case the proper statistical comparison has not changed. The court still must compare the demographic makeup of the positions at issue in the defendant's workplace with the demographic makeup of the qualified population in the relevant labor market as a whole.<sup>78</sup>

### Procedural Changes

The new legislation eliminated an important procedural defense by increasing the time to file suit from thirty to ninety days after a potential plaintiff receives notice of a right to sue.<sup>79</sup> A federal employee, however, still must file "timely" charges of discrimination with the agency and must exhaust all agency administrative procedures before he or she may file suit.<sup>80</sup>

### Mixed Motive Defense

Mixed motive cases arise when the employer considers both illegitimate factors—such as an individual's race, color, religion, sex, or national origin—and legitimate factors in making an employment decision. In *Price Waterhouse v. Hopkins*,<sup>81</sup> the Supreme Court held that an employer can escape liability for a violation of Title VII, if the employer establishes that it would have made the same employment decision even if it had not taken impermissible factors into account.<sup>82</sup>

The new legislation parallels the Eighth Circuit's holding in *Bibbs v. Block*<sup>83</sup> by separating the issues of liability and remedy in mixed motive cases. In *Bibbs* the Eighth Circuit held that a plaintiff can establish a violation of Title VII by proving that a discriminatory motive

had played some part in the challenged employment decision.<sup>84</sup> At a minimum, a plaintiff then would be entitled to a declaratory judgment, partial attorney fees, and injunctive relief.<sup>85</sup> To limit further relief, such as reinstatement, promotion, or backpay, the defendant would have to prove by a preponderance that it would have taken the same employment action absent the proven discrimination.<sup>86</sup>

The Civil Rights Act of 1991 partially removed the mixed motive defense by declaring that an unlawful employment practice is established "when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."<sup>87</sup> Like *Bibbs*, the new legislation permits a defendant to limit the plaintiff's award by demonstrating that it would have taken the same action in the absence of the illegal discrimination.<sup>88</sup> If the defendant meets this burden, the court must limit the plaintiff's relief to declaratory relief, injunctive relief, partial attorneys' fees, and costs.<sup>89</sup> The legislation specifically precludes the court from awarding damages or ordering "any admission, reinstatement, hiring, promotion or payment."<sup>90</sup>

### Retroactivity

The Act is vague regarding the retroactive applicability of its provisions to cases pending in court or at the administrative level. Section 402 states only that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."<sup>91</sup>

A court generally must apply a civil<sup>92</sup> statute prospectively, absent clear evidence that the legislature intended

<sup>77</sup> *Wards Cove Packing Co.*, 109 S. Ct. at 2122; see also 137 Cong. Rec. S15,473 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond) (Act shifts burden of proof to employer, but "on all other issues this Act leaves existing law undisturbed").

<sup>78</sup> 109 S. Ct. at 2121 (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977)); see also *Beazer*, 440 U.S. at 586 n.29.

<sup>79</sup> Civil Rights Act of 1991 § 114(1), 105 Stat. at 1079 (amending 42 U.S.C. § 2000e-16 (1988)).

<sup>80</sup> 137 Cong. Rec. S15,485 (daily ed. Oct. 30, 1991) (interpretive memorandum of Senators Cohen, Danforth, Hatfield, Spector, Chafee, Durenberger, and Jeffords). Senator Kennedy agreed with this portion of the interpretive memorandum. See *id.* at S15,485.

<sup>81</sup> 490 U.S. 228 (1989).

<sup>82</sup> *Id.* at 242.

<sup>83</sup> 778 F.2d 1318 (8th Cir. 1985); see Note, *supra* note 61, at S-2.

<sup>84</sup> *Bibbs*, 778 F.2d at 975.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Civil Rights Act of 1991 § 107(a), 105 Stat. at 1075 (adding subsection (m) to 42 U.S.C. § 2000e-2 (1988)). See generally 137 Cong. Rec. S15,476 (daily ed. Oct. 30, 1991).

<sup>88</sup> Civil Rights Act of 1991 § 107(b), 105 Stat. at 1075.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Civil Rights Act of 1991 § 402(a), 105 Stat. at 1099.

<sup>92</sup> Ex post facto considerations arise only in criminal or penal statutes. Hilde E. Kahn, *Completed Acts, Pending Cases, and Conflicting Presumptions: The Retroactive Application of Legislation After Bradley*, 13 George Mason U.L. Rev. 231 n.2 (1990) (citing *Hammond v. United States*, 786 F.2d 8, 16 (1st Cir. 1986)). The prohibition against Bills of Attainder applies only to legislation that can impose punishment. *Id.* (citing *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977); *United States v. Tyson*, 25 Env't Rep. Cas. (BNA) 1897, 1908 (E.D. Pa. 1986)).

otherwise.<sup>93</sup> Indeed, the Supreme Court recently endorsed this general principle of statutory construction.<sup>94</sup> In *Bowen v. Georgetown University Hospital*<sup>95</sup> the Supreme Court held that the Secretary of Health and Human Services had no authority under the Medicaid Act<sup>96</sup> to promulgate retroactive cost-limit rules.<sup>97</sup> Observing succinctly that "retroactivity is not favored in the law,"<sup>98</sup> the Court stated that "congressional enactments ... will not be construed to have retroactive effect unless their language requires this result."<sup>99</sup>

Contrary to this general principle of prospective application,<sup>100</sup> in *Bradley v. School Board of Rich-*

*mond*<sup>101</sup> the Court applied the Emergency School Aid Act,<sup>102</sup> which authorizes federal courts to award reasonable attorneys' fees in school desegregation cases, to a case in which the propriety of a fee award had been pending resolution on appeal when the statute became law.<sup>103</sup> The Court anchored its holding on the "principle that a court is to apply the law in effect at the time it renders its decision" unless manifest injustice would result or legislative intent precluded retroactive application.<sup>104</sup>

The circuits have split over which line of cases to follow. The Second,<sup>105</sup> Fourth,<sup>106</sup> Fifth,<sup>107</sup> Sixth,<sup>108</sup> Eighth,<sup>109</sup> Tenth,<sup>110</sup> and Federal<sup>111</sup> Circuits, and the Court of Appeals for the District of Columbia<sup>112</sup> follow

<sup>93</sup> Kahn, *supra* note 92, at 237; see also *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) ("principle that statutes operate only prospectively ... is familiar to every law student"); *Union P.R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *Nelson v. Ada*, 878 F.2d 277, 280 (9th Cir. 1989) ("As a general rule, legislative enactments ... apply only prospectively"); *Dion v. Secretary of Health & Human Servs.*, 823 F.2d 669, 671 (1st Cir. 1987) (as a general rule "legislation must be considered as addressed to the future, not to the past"); *Anderson v. US Air, Inc.*, 818 F.2d 49, 53 (D.C. Cir. 1987) ("statutes affecting substantive rights and liabilities are presumed to have only prospective effect") (quoting *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985)); *In re District of Columbia Worker's Compensation Act*, 554 F.2d 1075, 1079 (D.C. Cir. 1976); *Ralis v. RFE/RL Inc.*, 770 F.2d 1121, 1126 (D.D.C. 1985).

<sup>94</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[r]etroactivity is not favored in the law"); cf. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S. Ct. 1570, 1579 (1990) (Scalia, J., concurring).

<sup>95</sup> 488 U.S. 204 (1988).

<sup>96</sup> 42 U.S.C. § 1395x(v)(1)(A) (1988).

<sup>97</sup> *Bowen*, 488 U.S. at 209.

<sup>98</sup> *Id.* at 208.

<sup>99</sup> *Id.* (citing *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928)).

<sup>100</sup> One commentator has opined that *Bradley* conflicts with this long standing rule only when a change in legislation affects a party's liability for an act completed before the statute's enactment. See Kahn, *supra* note 92, at 237.

<sup>101</sup> 416 U.S. 696 (1974).

<sup>102</sup> 20 U.S.C. § 1617 (1970 & Supp. II) (repealed 1978). Section 718 of Title VII of this act authorized an award of attorneys' fees. See *Bradley*, 416 U.S. at 709.

<sup>103</sup> *Bradley*, 416 U.S. at 710. Recognizing the absence of any specific statutory authority for an attorney fee award, the district court based the award on its general equity power. *Id.* at 706.

<sup>104</sup> *Id.* at 711; accord *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969). The Senate authors of the Act's effective date provision specifically disapproved of these two cases. 137 Cong. Rec. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth).

<sup>105</sup> *Lehman v. Burnley*, 866 F.2d 33, 37 (2d Cir. 1989); *D'Arbois v. Sommoliers' Cellars*, 741 F. Supp. 489, 490 (S.D.N.Y. 1990).

<sup>106</sup> *Leland v. Federal Ins. Admin.*, 934 F.2d 524, 527 (4th Cir. 1991) ("[i]t is a fundamental and well established principle of law, however, that statutes are presumed to operate prospectively unless retroactive application appears from the plain language of the legislation") (citing *Bowen*).

<sup>107</sup> *Walker v. United States Dep't of Hous. & Urban Dev.*, 912 F.2d 819, 831 (5th Cir. 1990) ("the law disfavors retroactivity"); *Senior Unsecured Creditor's Comm. of First Republic Bank Corp. v. Federal Deposit Ins. Corp.*, 749 F. Supp. 758, 773 (N.D. Tex. 1990); see *Ramsey v. Stone*, No. EP-90-CA-361-H (W.D. Tex. Jan. 30, 1992) (citing *Bowen*, the court held that the Act is not retroactive). But cf. *La Cour v. Harris County*, 57 Fair Empl. Prac. Cas. (BNA) 622 (S.D. Tex. 1991) (permitting, without explanation, jury trial under Civil Rights Act of 1991).

<sup>108</sup> *United States v. Murphy*, 937 F.2d 1032, 1037-38 (6th Cir. 1991) (following *Bowen*'s presumption against retroactive application affecting substantive rights and liabilities, but recognizing a narrow *Bradley* application for purely procedural changes); see also *Johnson v. Rice*, No. 2:85-CV-1318 (S.D. Ohio Jan. 24, 1992) (LEXIS, Genfed library, Dist. file) (following *Murphy*, the court ruled that the Act is not retroactive regarding compensatory damages, but does apply to demand for a jury trial, which is a procedural matter; however, because the right to a jury depends upon the right to seek compensatory damages, a jury trial was unavailable in the instant case).

<sup>109</sup> *Simmons v. A.L. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991) ("[t]he better rule is that of *Georgetown Hospital*"); see also *Hill v. Broadway Indus.*, No. 90-1066-CV-W-3 (W.D. Mo. Jan. 7, 1992) (LEXIS, Genfed library, Dist. file). But cf. *Davis v. Tri-State Mack Distrib.*, 57 Fair Empl. Prac. Cas. 1025, 1027 (E.D. Ark. 1991) (with minimal discussion and no mention of *Simmons*, the court relied on "the remedial purposes of the legislation and the absence of any language therein against retroactive application" to hold that the Act is not retroactive).

<sup>110</sup> *Arnold v. Maynard*, 942 F.2d 761, 762 n.2 (10th Cir. 1991) ("we elected to follow *Bowen*'s holding") (citing *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990), cert. denied, 111 S. Ct. 799 (1991)); see *Hansel v. Public Serv. Co.*, 57 Fair Empl. Prac. Cas. (BNA) 858, 866 (D. Colo. 1991) (following *DeVargas* to hold that the Act is not retroactive).

<sup>111</sup> *Sargisson v. United States*, 913 F.2d 918, 923 (Fed. Cir. 1990) ("prefer the longer-standing rule that retroactivity is not presumed."); *Mai v. United States*, 22 Cl. Ct. 664, 667-68 (1991).

<sup>112</sup> *Alpo Pet Foods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 n.6 (D.C. Cir. 1990) ("[b]ecause the *Georgetown Hospital* rule seems more faithful to the older decisions that are being interpreted in the retroactivity debate ... we rely on that rule here") (opinion of Judge—now Justice—Clarence Thomas); see also *Van Meter v. Barr*, 57 Fair Empl. Prac. Cas. 769 (D.D.C. 1991) (citing *Alpo Pet Foods, Inc.*, the court ruled that the Act is not retroactive).

the *Bowen* presumption against the retroactive application of new statutes.<sup>113</sup> Conversely, the Seventh,<sup>114</sup> Eleventh,<sup>115</sup> and possibly the First<sup>116</sup> Circuits have adopted the *Bradley* presumption of retroactivity.

Recently, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*,<sup>117</sup> the Court held that an amendment to the federal statute governing the award of postjudgment interest<sup>118</sup> did not apply to judgments entered before the amendment's effective date.<sup>119</sup> The Court premised its holding on the plain language of the statute and on the absence of legislative intent to the contrary.<sup>120</sup> Although it remarked on the "apparent tension" between *Bradley* and *Bowen*, the Court declined to reconcile the conflicting line of cases.<sup>121</sup>

In his concurring opinion to *Kaiser Aluminum*, Justice Scalia criticized the Court severely for failing to reconcile the "irreconcilable contradiction" of *Bradley* and *Bowen*.<sup>122</sup> Justice Scalia called for the other justices to reverse *Bradley*<sup>123</sup> and to reaffirm the "clear rule of con-

struction that has been applied, except for these last two decades of confusion, since the beginning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only."<sup>124</sup>

Were a court to adopt the *Bradley* analysis, it still should apply the Civil Rights Act of 1991 prospectively. In *Bradley*, the Supreme Court recognized several exceptions to the retroactive application of new legislation. One exception exists when a legislative history evidences a congressional intent that the statute should not be applied retroactively. The Court noted that "a court is to apply the law in effect at the time it renders its decisions, unless ... there is ... legislative history to the contrary."<sup>125</sup> The weight of the Act's legislative history indicates that its drafters did not intend the new legislation to be retroactive in its application.<sup>126</sup> Indeed, the original Senate cosponsors of the Act—who drafted the effective date section—stated that they did not intend the new legislation to have any retroactive effect.<sup>127</sup> Accordingly, the

<sup>113</sup> Cf. *Ayala-Chavez v. Immigration & Naturalization Serv.*, 945 F.2d 288, 294 & n.9 (9th Cir. 1991) (recognizes "general rule of non-retroactivity" but declines to reconcile conflict between *Bowen* and *Bradley*). But cf. *Stender v. Lucky Stores, Inc.*, No. C-88-1467 (N.D. Cal. Dec. 19, 1991) (citing *In Re Reynolds*, 726 F.2d 1420, 1423 (9th Cir. 1984), the court held that the Act favors retroactive application).

Three district courts in the Third Circuit have held that the Act's provisions are not retroactive. See *Futch v. Stone*, No. 3:CV-90-0826 (M.D. Pa. Jan. 13, 1992) (finding that the Act is not retroactive on sovereign immunity grounds, but finding Justice Scalia's concurring opinion in *Kaiser Aluminum & Chem. Corp.* compelling); *Alexandre v. AMP, Inc.*, 57 Fair Empl. Prac. Cas. 768 (M.D. Pa. 1991) (holding, without opinion, that the Act is not retroactive); *Sinnovitch v. Port Auth. of Allegheny County*, No. 89-1524 (W.D. Pa. Dec. 31, 1991) (relying on legislative history and new Equal Employment Opportunity Commission guidelines to hold that the Act is not retroactive).

<sup>114</sup> *Federal Deposit Ins. Corp. v. Wright*, 942 F.2d 1089, 1095 n.6 (7th Cir. 1991) (no prejudice in applying *Bradley* to facts of particular case); see also *Mojica v. Gannett Co.*, 57 Fair Empl. Prac. Cas. 537 (N.D. Ill. 1991) (citing *Wright*, the court held that the Act is retroactive).

<sup>115</sup> *United States v. Peppertree Apartments*, 942 F.2d 1555, 1561 n.3 (11th Cir. 1991); accord *King v. Shelby Medical Ctr.*, No. 91AR-2258-S (N.D. Ala. 1991) (citing *Peppertree Apartments*).

<sup>116</sup> *Demars v. First Serv. Bank for Sav.*, 907 F.2d 1237, 1239-40 (1st Cir. 1990); cf. *Timberland Design, Inc. v. Federal Deposit Ins. Corp.*, 745 F. Supp. 784, 788 n.2 (D. Mass. 1990) ("Demars suggests that under First Circuit case law the touchstone for deciding which presumption to apply ... is whether retroactive application alters substantive rules of conduct and disappoints private expectations"). *Contra Dion v. Secretary of Health & Human Serv.*, 823 F.2d 669, 671 (1st Cir. 1987); *Rhode Island Higher Educ. Assistance Auth. v. Cavazos*, 749 F. Supp. 414, 419 (D.R.I. 1990) (applying legislation prospectively).

<sup>117</sup> 110 S. Ct. 1570 (1990).

<sup>118</sup> 28 U.S.C. § 1961 (1982) (amended 1983 and 1986).

<sup>119</sup> *Kaiser Aluminum & Chem. Corp.*, 110 S. Ct. at 1576; Kahn, *supra* note 92, at 235.

<sup>120</sup> *Kaiser Aluminum & Chem. Corp.*, 110 S. Ct. at 1576.

<sup>121</sup> *Id.* at 1577.

<sup>122</sup> *Id.* at 1579 (Scalia, J. concurring).

<sup>123</sup> Justice Scalia attacked *Bradley*'s weak precedential basis, contrasted its holding with the long-standing clear intent rule, objected to it as contrary to fundamental notions of justice, and expressed concern over the tremendous latitude judges were given by *Bradley*'s method of determining the applicability of exceptions to the rule. Kahn, *supra* note 92, at 236-36; *Kaiser Aluminum & Chem. Corp.*, 110 S. Ct. at 1579-88.

<sup>124</sup> *Kaiser Aluminum & Chem. Corp.*, 110 S. Ct. at 1579.

<sup>125</sup> *Bradley*, 416 U.S. at 711; see also *Kaiser Aluminum & Chem. Corp.*, 110 S. Ct. at 1577 (1990) ("under [*Bradley*] where the congressional intent is clear, it governs.").

<sup>126</sup> 137 Cong. Rec. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth); *id.* at S15,485 (reflecting views of Senators Danforth, Cohen, Hatfield, Spector, Chafee, Durenberger and Jeffords); *id.* at S15,478 (reflecting views of Bush administration and Senators Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond); *id.* at H9543 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde) ("provisions of this bill are prospective in nature, not retroactive"); *id.* at S15,952 (statement of Sen. Dole); *id.* at S15,966 (daily ed. Nov. 5, 1991) (Senators Gorton, Durenberger and Simpson). But cf. *id.* at S15,485 (daily ed. Oct. 30, 1991); *id.* at S15,963 (daily ed. Nov. 5, 1991) (statement of Sen. Kennedy) (courts will decide). *Compare Meter v. Barr*, No. 91-0027 (D.D.C. Dec. 18, 1991) (congressional intent unclear, but language of statute indicates Act applies prospectively) and *James v. American Int'l Recovery, Inc.*, No. 1:89-CV-321 (N.D. Ga. Dec. 3, 1991) (congressional intent indicates Act does not apply to cases arising before Nov. 21, 1991) with *Mojica v. Gannett Co., Inc.*, 57 Fair Empl. Prac. Cas. (BNA) 537 (N.D. Ill. 1991) (relying on *Bradley*, court held that legislative history does not indicate statute is to be applied prospectively only). See generally *New Civil Rights Law Does Not Apply To Pending Cases*, *DJ Brief Maintains*, Gov't Empl. Rel. Rep. (BNA) No. 1443, at 1580-81 (Dec. 9, 1991) (discussing *James* and *Mojica*).

<sup>127</sup> 137 Cong. Rec. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth); *id.* at S15,493 (statement of Sen. Murkowski).

new legislation should not apply to cases filed before November 21, 1991.<sup>128</sup>

### Conclusion

The Civil Rights Act of 1991 significantly altered federal discrimination law. It exposes the Army to greater

liability for the conduct of its employees. Agency counsel can expect an increase in the number and length of discrimination cases as judges attempt to read meaning into the Act's ambiguous provisions and as plaintiffs take advantage of greater financial and procedural incentives to sue.

<sup>128</sup> Whether the new legislation applies to cases whose cause of action—a discriminatory act—arose before the enactment date is less certain. Specific support for that proposition appears in the legislative history, albeit only intermittently. See *id.* at H9548 (daily ed., Nov. 7, 1991) (statement of Rep. Hyde) (no retroactive application to "conduct occurring before the date of enactment of this Act.'). The Equal Employment Opportunity Commission has asserted that the new legislation does not apply to discriminatory conduct occurring before November 21, 1991. Equal Employment Opportunity Comm'n Directive 915.002, Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct (Dec. 27, 1991), reprinted in 159 EEOC Compl. Man. (BNA) N:6063 (Jan. 27, 1992) (notices supplement); see also *EEOC Contends That Civil Rights Act Is Not Retroactive*, Wash. Post, Jan. 1, 1992, at A5, col. 2. Furthermore, in *Bowen* the Court apparently held that "courts must not apply a statute that changes the legal consequences of completed acts without evidence of clear legislative intent to do so. See Kahn, *supra* note 92, at 234 (emphasis added).

## Mootness: The Unwritten Rule for Rejecting Equal Employment Opportunity Complaints

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### Introduction

How many times have you heard a commander or a supervisor lament that the equal employment opportunity (EEO) system<sup>1</sup> breeds meritless complaints that never go away? Even after an employee has left the agency, his or her unfounded complaints about "harassment" and a "hostile environment" continue to plod their way through the system, wasting taxpayers' money and productive personnel time.

For some complaints, this may be a painfully accurate description. The administrative process may take several years in some cases. Many complaints, however, can be rejected or canceled based on the legal doctrine of mootness as it is applied by the Equal Employment Opportunity Commission (EEOC). This article will outline the concepts involved in applying mootness to EEO complaints.

### Historical Analysis

The current EEOC rules<sup>2</sup> allow an agency to reject a formal complaint of discrimination only for specific, restricted reasons.<sup>3</sup> Mootness is not one of the listed bases for rejection. Nevertheless, agencies can read the established legal doctrine of "mootness" into the rules and can use it to reject or cancel allegations of discrimination.<sup>4</sup>

The seminal case for mootness analysis is *County of Los Angeles v. Davis*,<sup>5</sup> in which the United States Supreme Court developed a two-part mootness test from existing Court precedent. The Court held that an agency may dismiss a complaint as moot if: (1) the agency has no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have eradicated completely the effects of the alleged violation.<sup>6</sup> A "live" controversy no longer exists if both requirements are sat-

<sup>1</sup> See generally 29 C.F.R. pt. 1613 (1990) (implementing 42 U.S.C. § 2000e-16 (1988)); Army Regulation 690-600, Civilian Personnel: Equal Employment Opportunity Discrimination Complaints (18 Sept. 1989) [hereinafter AR 690-600].

<sup>2</sup> The EEOC rules for processing complaints of discrimination in the federal sector appear at 29 C.F.R. pt. 1613 (1991).

<sup>3</sup> An agency shall reject or cancel an allegation under 29 C.F.R. § 1613.212 that (1) fails to state a claim or that states a claim already decided or pending; (2) alleges the agency is proposing to take an action that may be discriminatory; (3) is pending before a United States district court; (4) is untimely; (5) was pursued under a negotiated grievance procedure; (6) has not been prosecuted; or (7) was the subject of an offer of full relief. 29 C.F.R. § 1613.215 (1991); see also AR 690-600, para. 2-5 (implementing EEOC rules on acceptance of complaints).

<sup>4</sup> On October 31, 1989, the Commission proposed new rules to govern the processing of federal-sector EEO complaints. The proposed rules are to be published as 29 C.F.R. pt. 1614. See 54 Fed. Reg. 45,747 (1989); see also *infra* notes 29-30 and accompanying text. After a lengthy comment and review period, the EEOC modified the proposed rules. Because it did not consider these changes substantive, the EEOC did not republish the rules in the *Federal Register*; however, it did circulate the modifications to federal agencies for review and comment. At present, no fixed timetable exists for issuance of final rules.

On October 22, 1991, legislation was introduced that would alter existing administrative complaint procedures significantly. See H.R. 3613, 102d Cong., 1st Sess. (1991). If enacted, this legislation would reduce agency participation in the EEO process sharply, but would not affect directly the proposed rules' simplification of the mootness test. See *id.*

<sup>5</sup> 440 U.S. 625 (1979).

<sup>6</sup> *Id.* at 631.

isfied because "neither party [then] has a legally cognizable interest in the final determination of the underlying questions of fact and law."<sup>7</sup>

Over the years, the EEOC has struggled to reconcile the *Davis* test with its own rules. In *Lurk v. United States Postal Service*<sup>8</sup> the EEOC refused to consider mootness as a ground for rejecting complaints. In that case, the Postal Service had rejected Lurk's complaint, holding that the complaint became moot when the Postal Service removed from Lurk's personnel records a letter of warning to which Lurk had objected. On review, the EEOC stated that "[n]either mootness, nor [a] request for inappropriate relief are grounds for rejection of a complaint under EEOC Regulations." In *Guyton v. United States Postal Service*,<sup>9</sup> however—which the EEOC decided several months before it decided *Lurk*—the Commission affirmed without explanation the Postal Service's rejection for mootness of an appellant's complaint. The EEOC made no effort to reconcile these conflicting decisions.

### Recognition of "Mootness" by the EEOC

In 1985, the Commission first found mootness to be cognizable under its rules. In *Burson v. United States Postal Service*,<sup>10</sup> the complainant alleged that the Postal Service had subjected her to racial and reprisal discrimination when it denied her unemployment benefits after firing her. Noting that the complainant eventually had collected state unemployment compensation, the agency rejected her EEO complaint for mootness. The EEOC affirmed the rejection. It stated that, although mootness is

not enumerated specifically as a basis for rejection in the EEOC rules, an agency may reject a moot complaint because the complainant "no longer [is] aggrieved" under title 29, Code of Federal Regulations (C.F.R.) section 1613.212(a) when a live controversy no longer exists.

The EEOC since has elaborated on the *Burson* analysis. Now it regularly permits agencies to reject complaints for mootness. In its most recent opinions, the Commission has remarked repeatedly that "inherent in the regulations' characterization of aggrieved is that some direct harm must have affected a term, condition, or privilege of the appellant's employment."<sup>11</sup> If a complaint is moot, the complainant no longer is aggrieved under 29 C.F.R. section 1613.212(a) and, therefore, lacks a valid claim as contemplated by 29 C.F.R. section 1613.215(a)(1).<sup>12</sup> Accordingly, the agency may reject or cancel the complaint for failure to state a claim.<sup>13</sup>

### Mootness Confused

Occasionally, the Commission dispenses with its "no longer aggrieved" analysis and affirms an agency's rejection solely for mootness. In *Pangarova v. Department of the Army*,<sup>14</sup> the agency removed the appellant from her engineering position after she forfeited her security clearance. Pangarova responded by filing a mixed case appeal with the Merit Systems Protection Board (MSPB),<sup>15</sup> claiming that she was the victim of unlawful gender, nationality, age, and reprisal discrimination.<sup>16</sup> The MSPB affirmed her removal and the EEOC

<sup>7</sup>*Id.*

<sup>8</sup>EEOC No. 01832207 (Equal Employment Opportunity Comm'n June 18, 1984).

<sup>9</sup>EEOC No. 01820933 (Equal Employment Opportunity Comm'n April 30, 1984).

<sup>10</sup>EEOC No. 01841116 (Equal Employment Opportunity Comm'n Jan. 28, 1985). Unfortunately, this decision did not signal the end of the confusion over application of mootness in EEOC cases. In *Pennison v. United States Postal Serv.*, EEOC No. 01842755 (Equal Employment Opportunity Comm'n Feb. 12, 1985), the EEOC declared that "EEOC Regulation 29 C.F.R. sec. 1613.215 narrowly circumscribes the permissible grounds for cancellation of an EEO complaint; mootness is not among them."

<sup>11</sup>*E.g.*, Colantouni v. Export-Import Bank Agency, EEOC No. 01902813 (Equal Employment Opportunity Comm'n Aug. 10, 1990).

<sup>12</sup>This provision requires a complainant to state an allegation over which the agency has control. See 29 C.F.R. § 1613.215(a)(1) (1991). The parallel provision in the proposed EEOC rules is 29 C.F.R. § 1614.107. See 54 Fed. Reg. 45,747, 45,754 (1989) (proposed Oct. 31, 1989).

<sup>13</sup>*Cf.* AR 690-600, paras. 2-5, 2-6 (setting forth provisions parallel to the EEOC rules).

<sup>14</sup>EEOC No. 01893171 (Equal Employment Opportunity Comm'n Apr. 26, 1990). For a historical perspective of the *Pangarova* case, see also *Pangarova v. Department of the Army*, 42 M.S.P.R. 319 (1990).

<sup>15</sup>An adverse action may be appealed by "mixed case complaint" or "mixed case appeal" procedures if it is subject to the jurisdiction of the Merit Systems Protection Board (MSPB) and includes allegations of discrimination. A mixed case complaint is processed first as a complaint of discrimination and then appealed to the Board. See 5 C.F.R. § 161; 29 C.F.R. § 1613.401; see also 54 Fed. Reg. 45,747, 45,758 (1989) (to be codified at 29 C.F.R. § 1614.302) (proposed Oct. 31, 1989). A mixed case appeal is heard first by the MSPB and may be petitioned to the EEOC. 5 C.F.R. § 1201.151; 29 C.F.R. § 1613.402; see also 54 Fed. Reg. 45,747, 45,758 (1989) (to be codified at 29 C.F.R. § 1614.303) (proposed Oct. 31, 1989).

<sup>16</sup>Commission rules at 29 C.F.R. § 1613.261 guarantee that any individual involved in the EEO process will not be subject to reprisal for his or her participation in the EEO process. This guarantee derives directly from title VII of the Civil Rights Act. See 42 U.S.C. § 2000e-3(a) (1988); *Ayon v. Sampson*, 547 F.2d 446, 449-50 (9th Cir. 1976); *Sorrells v. Veterans' Admin.*, 576 F. Supp. 1254, 1258 (D. Ohio 1983) ("Congress intended to include available remedies against retaliatory discharges when it amended the 1964 Civil Rights Act ... and extended its coverage to the federal government"). A complainant may allege reprisal as an additional basis for an EEO complaint. See, e.g., *Chen v. General Accounting Office*, 821 F.2d 732 (D.C. Cir. 1987); *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984). The standard of proof for an allegation of discrimination based on reprisal differs from the tests applied in other cases. See *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986); see also *Wrenn v. Gould*, 808 F.2d 493 (6th Cir. 1987).

upheld the MSPB decision to reject Pangarova's discrimination allegations.<sup>17</sup> The appellant then filed an EEO complaint against the labor counselor and EEO officer, claiming that they had made false and misleading statements during the MSPB proceedings. Affirming the Army's cancellation of Pangarova's EEO complaint, the EEOC stated simply that the finalization of the MSPB decision and the EEOC's affirmation of that decision had rendered her other allegations moot.<sup>18</sup> Significantly, the Commission did not rule that Pangarova was "no longer aggrieved"; nor did it rely upon other language derived from the EEOC rules as a basis for the affirmation.

In some cases, however, the EEOC still vacillates on whether mootness applies under its rules. For example, in *Wynne v. Department of the Army*,<sup>19</sup> the complainant alleged that the Army had failed to stop other personnel from smoking in his presence, had failed to make him acting civilian personnel officer, and essentially had treated him as *persona non grata*. He claimed that his Army supervisor's motivation for mistreating him in this fashion was based on his race, gender, handicap, and age. After the complainant retired, the Army rejected his EEO complaints for failure to state a claim. The EEOC initially ordered the Army to reinstate the complaints, warning that mootness is not a proper basis for rejection under the EEOC rules. Upon request for reopening, however, the Commission reversed itself. In its second opinion, the Commission did not refer to the "no longer aggrieved" standard. Instead, it cited strong policy reasons for recognizing mootness, declaring: "In virtually all complaints which involve mootness, the complainant is not an agency employee and the allegations are non-economic in nature. Failure to remove these complaints from the system burdens an already burdened system with remediless complaints."<sup>20</sup>

#### Analysis of Moot Issues

Often the focal issue in a mootness analysis is the harm that the complainant claims to have suffered. A complainant generally continues to be "aggrieved" as long as he or she may recover backpay or other equitable monetary relief. The absence of any reasonable possibility of pecuniary recovery, however, is not necessarily dispositive. A complaint that does not involve monetary relief still may

present a "live" controversy and, therefore, might not be subject to rejection or cancellation for mootness.

In *Diggs v. Department of Veterans' Affairs*<sup>21</sup> the appellant alleged that the agency had subjected her to handicap discrimination and reprisal through verbal and written reprimands and harassment. After it withdrew the reprimands, the agency rejected the appellant's continuing complaint, asserting that she had failed to state a claim. The EEOC reversed the agency's rejection. Although it found that the agency had based the reprimands on the appellant's performance, it held that an issue still existed concerning the appellant's allegations that her supervisor had harassed her and that the government had failed to accommodate her handicap.

The EEOC analysis in *Diggs* certainly would have differed had the appellant left the agency. Because the appellant continued to work for the Department of Veterans' Affairs after filing her complaint, the Commission found that the agency reasonably could not conclude that the alleged violations would not recur. Accordingly, it held that the agency had failed to satisfy the first prong of the *Davis* mootness test. The Commission's holding in *Diggs* is hardly unique. The EEOC typically reviews a mootness rejection or cancellation with greater scrutiny when a complainant continues to work for the agency.

The EEOC often reverses decisions that cancel only portions of a complaint for mootness. If any allegation remains uncorrected or unresolved, all the complainant's allegations, taken together, may indicate a pattern of discriminatory conduct. For example, the appellant in *Dubose v. Defense Logistics Agency*<sup>22</sup> claimed that he had suffered a lower performance rating, limited promotion opportunities, harassment, and diminished job responsibilities because of a supervisor's racial discrimination against him. The agency reassigned the appellant, then cancelled as moot his allegations of harassment and diminished job responsibilities. The Commission reversed. It found that the cancelled allegations were intertwined with the other issues and could be probative of discrimination.<sup>23</sup> Significantly, Dubose, like Diggs, still worked for the agency when the EEOC reviewed the cancellation of his claim.

<sup>17</sup>Under mixed case appeal procedures, an appellant may appeal the decision on an allegation of discrimination only to the EEOC. See 5 C.F.R. § 1201.161; 29 C.F.R. § 1613.403; see also 54 Fed. Reg. 45,747, 45,758 (1989) (to be codified at 29 C.F.R. § 1614.303) (proposed Oct. 31, 1989).

<sup>18</sup>"A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Pangarova*, EEOC No. 01893171 (citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

<sup>19</sup>EEOC No. 05890962 (Equal Employment Opportunity Comm'n Nov. 9, 1989).

<sup>20</sup>*Id.*

<sup>21</sup>EEOC No. 019003169 (Equal Employment Opportunity Comm'n Sept. 12, 1990).

<sup>22</sup>EEOC No. 05900273 (Equal Employment Opportunity Comm'n June 18, 1990).

<sup>23</sup>In this decision, the Commission strongly supported mootness as an inherent principle contained in the EEOC rules. Although *Dubose* later was reversed on other grounds, it may be cited as authority for rejecting or cancelling complaints for mootness when a complainant no longer is aggrieved.

## Rejecting or Canceling Moot Complaints

When reviewing an EEO complaint for acceptance,<sup>24</sup> a labor counselor must consider whether the complainant's allegations continue to present "live" controversies. The following is a list of relevant questions in a mootness analysis:

- Has the complainant left the agency or been reassigned?
- Has an alleged offending supervisor left the agency?
- Has any agency already provided the complainant with the requested relief?
- Are any of the allegations in the complaint still unresolved?
- Could the agency award the complainant equitable monetary relief to compensate him or her for nonpromotion, nonselection, or a withheld step increase?

When an allegation is moot before an agency accepts or rejects a complaint, the agency should reject<sup>25</sup> the allegation in a separate letter that advises the appellant that he or she may appeal the rejection to the EEOC.<sup>26</sup> This letter also should cite clearly the EEOC rules that govern cases in which a complainant is "no longer aggrieved."<sup>27</sup>

Cancelling a complaint for mootness after it has been accepted is similar to processing an offer of full relief. The primary difference is that the agency need obtain no certification of "mootness" from the Equal Employment Opportunity Compliance and Complaints Review Agency

(EEOCCRA). Instead, the complaint is cancelled locally and the complainant is given appeal rights to EEOC.<sup>28</sup>

A rejection or cancellation based on mootness should explain clearly why the complainant no longer is aggrieved. The notice must include enclosures from, or references to, the administrative record to support the decision. The EEOC will overturn a decision if the agency fails to explain or document it adequately.

## New EEOC Rules

Application of the mootness doctrine in federal EEO practice should be much simpler if the EEOC implements its new rules.<sup>29</sup> In the proposed rules, the Commission has attempted to remedy its previous oversight by including mootness as an independent basis for rejection, or "dismissal," of a complaint.<sup>30</sup> Under these rules, the Commission could apply the *Davis* analysis directly, without having to resort to the hybrid, "no longer aggrieved" rationale.

## Conclusion

The volume of EEO complaints is growing in these times of employment unrest and uncertainty. Recently announced reductions in military personnel and Defense Department civilian employees should contribute to an increase in complaints in fiscal year 1992. Every labor counselor, however, can reduce his or her case load and preserve taxpayer dollars by screening formal complaints diligently for moot allegations before accepting them. A periodic review of case files also may reward the labor counselor by revealing moot complaints that are ripe for cancellation or for dismissal under the new rules. A labor counselor may find a review of this sort especially useful before he or she forwards a complainant's file to the EEOC for hearing.

<sup>24</sup> Army Regulation 690-600, paragraph 2-6a(3), states that an EEO officer should coordinate acceptance or rejection of a complaint with the labor counselor "when appropriate." For a labor counselor to review complaints before an EEO officer acts on the complaint is *always* appropriate. The issues framed in the acceptance letter are legal positions that the labor counselor later may have to defend. If an EEO officer fails or refuses to forward complaints for review before acceptance, the labor counselor should refer the matter to the commander.

<sup>25</sup> Allegations are "dismissed," instead of rejected, under proposed 29 C.F.R. pt. 1614. See *infra* note 30.

<sup>26</sup> The rejection is a final decision that the complainant may appeal to the EEOC. See 29 C.F.R. §§ 1613.215(b), 1613.231; see also 54 Fed. Reg. 45,747, 45,754 (1989) (to be codified at 29 C.F.R. § 1614.107) (proposed Oct. 31, 1989); *id.* at 45,760 (to be codified at 29 C.F.R. § 1614.401); AR 690-600, paras. 2-6, 2-12, 6-1. A rejection may be appealed to the EEOC Office of Federal Operations (formerly the Office of Review and Appeals). See 29 C.F.R. §§ 1613.215(b), 1613.231; see also 54 Fed. Reg. at 45,754, 45,760 (to be codified at 29 C.F.R. §§ 1614.107, 1614.401); AR 690-600, paras. 2-6, 2-12, 6-1.

<sup>27</sup> 29 C.F.R. §§ 1613.212, 1613.215(a) (1991); see also 54 Fed. Reg. 45,747, 45,753-54 (1989) (to be codified at 29 C.F.R. §§ 1614.106, 1614.107) (proposed Oct. 31, 1989).

<sup>28</sup> AR 690-600, paras. 2-6c, 2-18, 7-11b.

<sup>29</sup> See 54 Fed. Reg. 45,747 (1989) (to be codified at 29 C.F.R. pt. 1614) (proposed Oct. 31, 1989).

<sup>30</sup> A proposed rule at 29 C.F.R. pt. 1614 allows agencies to dismiss a complaint for mootness: "The agency shall dismiss that portion of a complaint ... [t]hat is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory." 54 Fed. Reg. 45,747, 45,754 (1989) (to be codified at 29 C.F.R. § 1614.107(5)) (proposed Oct. 31, 1989). The terms "cancel" and "reject" have been deleted in the proposed part 1614; complaints now are accepted or "dismissed." See *id.*

## Practical Problems of Sobriety Checkpoints

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The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>1</sup>

The message was clear—do not search without a warrant. Yet when the Fourth Amendment was written two hundred years ago, could any of the signatories have foreseen an intoxicated citizen travelling along a smoothly paved surface in a metal horseless carriage at more than sixty miles per hour? Could any of them have envisioned a time when 25,000 American lives would be lost each year at the hands of drunk drivers?<sup>2</sup> Absolutely not.

Not surprisingly, courts have developed numerous exceptions to the Fourth Amendment's absolute language over the last few decades. Although the law still protects a citizen's home as "his [or her] castle," it also gives law enforcement agencies a fighting chance in the war against crime.

One of the most important exceptions deals with automobiles. In *South Dakota v. Opperman*,<sup>3</sup> the Supreme Court held that one's expectations of privacy in an automobile and of freedom in its operation differ significantly from one's traditional expectations of privacy and freedom in one's residence.<sup>4</sup> Since *Opperman*, the Supreme Court has defined the scope of an individual's reasonable expectations of privacy in many situations arising from searches of automobiles, including searches pursuant to roadblock stops.

One of the first decisions to address roadblocks was *United States v. Martinez-Fuerte*.<sup>5</sup> In *Martinez-Fuerte*, officers of the United States Border Patrol set up a roadblock on the principal highway between San Diego and Los Angeles. They briefly stopped every northbound

vehicle, directing a small percentage of the drivers to pull off to a secondary area for further questioning. The Supreme Court ultimately upheld the Border Patrol's actions.<sup>6</sup>

Although *Martinez-Fuerte* dealt with a roadblock set up to detect illegal aliens, many of the principles upon which it was premised also apply to sobriety checkpoints. Acknowledging that "[t]he Fourth Amendment imposes limits on search and seizure power ... to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals,"<sup>7</sup> the *Martinez-Fuerte* Court nevertheless pointed out that these limits are *not* absolute. Instead, they require the courts to balance legitimate public interests against the Fourth Amendment interests of private individuals. In defining a person's privacy interest in an automobile, the Court emphasized that it "deal[t] neither with searches nor the sanctity of private dwellings, [which] ordinarily [must be] afforded the most stringent Fourth Amendment protection."<sup>8</sup> It concluded that "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant."<sup>9</sup> The Court also declared that law enforcement officials properly may "refer motorists selectively to ... [a] secondary inspection area ... on the basis of criteria that would not sustain a roving patrol stop."<sup>10</sup>

The Supreme Court more recently applied many of its findings in *Martinez-Fuerte* to a roadblock erected as a sobriety checkpoint in *Michigan v. Sitz*.<sup>11</sup> Criminal law practitioners should review carefully the way that law enforcement officials managed the roadblock in *Sitz* because the Court expressly found these methods constitutional.

In *Sitz*, an advisory committee made up of senior members of Michigan State Police, local law enforcement agencies, and the prosecuting attorney's office developed certain roadblock procedures. These procedures covered

<sup>1</sup> U.S. Const. amend. IV.

<sup>2</sup> See 4 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.8(d), at 71 (2d ed. 1987).

<sup>3</sup> 428 U.S. 364 (1976).

<sup>4</sup> *Id.* at 367 (citing *Cardwell v. Lewis*, 417 U.S. 583, 589 (1973)).

<sup>5</sup> 428 U.S. 543 (1976).

<sup>6</sup> *Id.* at 566.

<sup>7</sup> *Id.* at 554 (citations omitted).

<sup>8</sup> *Id.* at 561.

<sup>9</sup> *Id.* at 566.

<sup>10</sup> *Id.* at 563.

<sup>11</sup> 110 S. Ct. 2481 (1990).

everything from the selection of roadblock sites to publicity releases and the development of a checkpoint protocol for field officers. The committee also published advance notices that the state police would set up roadblocks on a particular day to identify drunk drivers, although it did not reveal exactly when the roadblock would be erected or where it would be located. Finally, the committee chose a specific site for the roadblock after reviewing traffic patterns, accident statistics, and arrest reports for individuals apprehended for drunk driving offenses.

When the state police actually set up the roadblock, they used signs and flashers to alert motorists of a stop ahead. They stopped all motorists and examined them briefly for signs of intoxication. The roadblock was in place for seventy-five minutes. During this time, police stopped 126 cars for an average delay of twenty-five seconds per car.

Each officer assigned to stop traffic was instructed to direct a motorist to a secondary checkpoint out of the traffic flow if he or she detected any sign that the driver was intoxicated. At the secondary checkpoint, the officer would check the driver's license and registration and, if appropriate, would conduct further sobriety tests. Police ultimately directed only two of the 126 drivers they stopped to perform field sobriety tests. Of these two drivers, police arrested one for driving under the influence of alcohol (DUI).<sup>12</sup>

The *Sitz* Court applied a balancing test to evaluate the constitutionality of the state police roadblock. Chief Justice Rehnquist, writing for the majority, observed that "[d]runk drivers cause an annual death toll of over 25,000 [lives] and in the same timespan cause nearly one million personal injuries and more than five billion dollars in property damage."<sup>13</sup> As the Chief Justice cogently noted, the staggering extent of this cost to society certainly points to a compelling government interest in preventing drunk driving.<sup>14</sup> The objective intrusion on the liberty of the individuals stopped at the roadblock—on the average, a delay of twenty-five seconds—was slight in comparison.<sup>15</sup> The Court also emphasized that checkpoint stops are much less intrusive than roving stops.<sup>16</sup> At checkpoints or roadblocks, drivers can see that police

are stopping all the other cars around them, the officers' uniforms are a visible symbol of their lawful authority, and the drivers are much less likely to be startled or annoyed by the intrusion.<sup>17</sup> Significantly, Chief Justice Rehnquist pointed out that "[t]he 'fear and surprise' to be considered are *not* the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law abiding motorists by the nature of the stop."<sup>18</sup>

Another issue addressed by the *Sitz* Court was the "effectiveness" of the program—what former Chief Justice Warren Burger described in *Brown v. Texas* as "the degree to which the seizure advances the public interest."<sup>19</sup> At first glance, *Sitz* appears to rest on shaky ground. Surely a ratio of one drunk driver apprehended out of 126 drivers stopped is almost per se "ineffective." The Court, however, pointed out that

[t]his passage from *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunk drivers is preferable. For purposes of Fourth Amendment analysis the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and responsibility for, limited public resources, including a finite number of police officers.<sup>20</sup>

In its final analysis, the *Sitz* Court determined that the procedures the state police used here were proper, concluding that "the balance of the state's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the State Program."<sup>21</sup>

### Constitutional Roadblocks

*Sitz* demonstrates that law enforcement officials should draft guidelines carefully before proceeding with any roadblock or checkpoint. The first item that officials

<sup>12</sup>A second driver who drove through the roadblock without stopping also eventually was stopped and arrested for driving under the influence. *Id.* at 2484.

<sup>13</sup>*Id.* at 2486 (citing 4 LaFave, *supra* note 2, § 10.8(d), at 71).

<sup>14</sup>See *id.* at 2485.

<sup>15</sup>*Id.* at 2486.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Id.* (emphasis added).

<sup>19</sup>*Brown v. Texas*, 443 U.S. 47, 51 (1979).

<sup>20</sup>*Sitz*, 110 S. Ct. at 2487.

<sup>21</sup>*Id.* at 2488.

should consider is the purpose of the roadblock. Ideally, the roadblock's primary purpose should be to *deter* drunk driving by increasing public perception of the seriousness of the DUI problem and of the law enforcement agency's determination to seek out and to apprehend drunk drivers. The primary purpose should *not* be to enforce drunk driving laws or to discover and punish drunk drivers.<sup>22</sup>

Next, law enforcement officials should decide on a location for the roadblock. In *Sitz*, the state police selected a checkpoint location according to the following directives:

(1) The site selected shall have a safe area for stopping a driver and must afford oncoming traffic sufficient sight distance for the driver to safely come to a stop upon approaching the checkpoint.

(2) The location must ensure minimum inconvenience for the driver and facilitate the safe stopping of traffic in one direction.

(3) Roadway choice must ensure that sufficient adjoining space is available to pull the vehicle off the travelled portion of the roadway for further inquiry if necessary.<sup>23</sup>

To follow the example set in *Sitz*, law enforcement officials should choose checkpoint sites in a managerial fashion. Field officers may offer input, but should not select the sites themselves. Moreover, the guidelines should ensure that the chosen location actually does advance the government's interest in deterring and detecting drunk driving. If an accused later attempts to challenge the government's site selection, the prosecutor can convince a court that the location was chosen properly by showing that law enforcement officials based their decision on arrest statistics or accident data. Notably, an Oklahoma appeals court *disallowed* a roadblock when it found that, "in establishing the sites for the roadblocks, [law enforcement] officers did not even consult statistics available regarding high traffic areas."<sup>24</sup> The government must be able to demonstrate a rational basis for its choice of the location, as well as its concerns for public safety and its efforts to minimize inconvenience to motorists.

A law enforcement agency should set down in writing the purpose of its roadblock program, the factors to be considered in choosing a location, and explicit instructions on conducting the roadblock. Moreover, it should disseminate this information to its field officers before it allows them to embark on any roadblock detail. The Michigan State Police published its roadblock guidelines in a sixteen-page booklet. This booklet not only lists purposes, goals, and procedures, but also includes detailed diagrams for setting up roadblocks and a list of necessary equipment.<sup>25</sup> Moreover, the state police briefed field officers before they set up the checkpoint and debriefed them immediately after the roadblock operation ended. That the state police department in *Sitz* reduced its roadblock procedures to writing, explained them to its field officers, and ensured that the field officers followed them was critically important. As *Sitz* revealed, the discretion of field officers to stop cars at the roadblock should be kept to a minimum.<sup>26</sup>

Courts tend to find problems with roadblocks that law enforcement agencies conduct without the limitations of detailed guidelines. In *State v. Jones* the Florida Supreme Court denied the admissibility of evidence obtained in a roadblock search, stating that "a written set of uniform guidelines must be issued before a roadblock can be utilized to apprehend motorists driving under the influence of alcohol, covering in detail procedures which field officers are to follow in the roadblock."<sup>27</sup> Appellate courts in Nebraska,<sup>28</sup> New Jersey,<sup>29</sup> and Pennsylvania<sup>30</sup> likewise have excluded evidence seized at roadblocks when the "degree of discretion vested in the field officers rendered the [roadblock] procedures constitutionally infirm."<sup>31</sup>

Law enforcement officials also should staff the roadblock properly. The Michigan guidelines approved by the Supreme Court identify six different duty positions at a roadblock.

One key actor is the "officer in charge." Preferably a high-ranking law enforcement agent, the officer in charge may shut down the roadblock operation if weather or traffic conditions create safety hazards.

Another participant, the "approach safety officer," should be stationed along the shoulder. As drivers

<sup>22</sup>See, e.g., *State ex rel. Ekstrom v. Justice Court*, 663 P.2d 992 (Ariz. 1983).

<sup>23</sup>Michigan Dep't of State Police, *Sobriety Checkpoint Guidelines for Law Enforcement Agencies* (July 1990) (used with permission of Lieutenant Al Slaughter, Michigan State Police).

<sup>24</sup>*State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984).

<sup>25</sup>See Appendix A, B.

<sup>26</sup>*Sitz*, 110 S. Ct. at 2487; see also *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

<sup>27</sup>483 So. 2d 433 (Fla. 1986).

<sup>28</sup>*State v. Crom*, 383 N.W.2d 461 (Neb. 1986).

<sup>29</sup>*State v. Kirk*, 493 A.2d 1271 (N.J. Super. Ct. App. Div. 1985).

<sup>30</sup>*Commonwealth v. Leninsky*, 519 A.2d 984 (Pa. Super. Ct. 1986).

<sup>31</sup>*Id.* at 993.

approach the checkpoint, he or she should watch them for potentially hazardous behavior, such as obvious drunken or reckless driving, and should warn the roadblock officers of these dangers. Under no circumstances should the approach safety officer leave his or her post.

If sufficient personnel are available, the roadblock team should deploy an "observation officer" to watch all traffic entering and leaving the checkpoint. This officer should concentrate on drivers that avoid the checkpoint, scrutinizing their conduct for signs of intoxication. The officer would pursue an evasive vehicle only after reporting his or her observations to the officer in charge and receiving instructions to apprehend the driver.

The team also should appoint a "data collection officer" to record information on the numbers of drivers entering the checkpoint, drivers detained by police, and drivers actually arrested. He or she also would time the delays resulting from the stoppages.

A "lane safety officer" should ensure that the flares and lights leading up to the checkpoint remain lit and that all road cones are in place. He or she should be alert for any safety hazards that may develop.

Finally, the most important actors in a roadblock operation are the "checkpoint contact officers"—the agents that actually stop the cars and examine the drivers. Most roadblocks probably would stand or fall based on their conduct. Contact officers should be highly experienced in identifying drunk drivers because they must decide which drivers will be detained for further investigation and which must be arrested for DUI. They should be highly visible, wearing reflective vests and conspicuous police insignia, and should carry flashlights. As each automobile is stopped, the officer should identify himself or herself and should explain the reason for the stop. If the officer observes no indications of intoxication, he or she should direct the driver to proceed.<sup>32</sup> On the other hand, if the officer does detect some sign that the driver may be intoxicated, he or she should direct the driver to a safe area off the travelled roadway. There, the same officer should examine the driver more closely, using field sobriety tests and preliminary breath tests. If the driver is intoxicated, he or she should be arrested. If not intoxicated, the driver should be told to proceed.

All officers must follow the guidelines consistently. In *Delaware v. Prouse*, the Supreme Court indicated that a

checkpoint operation may be constitutionally sound even if police stop only one car in ten if the officers stopped the cars pursuant to a predetermined system and not as the result of unfettered exercises of discretion.<sup>33</sup> State courts also have allowed pattern stops under these circumstances.<sup>34</sup>

One final consideration for law enforcement officials is how the government should publicize the roadblock. Courts are more likely to allow a roadblock that the government sets up to deter drunk drivers and preemptive publicity is crucial to proving that purpose. Indeed, several state courts that struck down convictions stemming from roadblock stops emphasized the roles that prior publicity played in their decisions. In *State ex rel. Ekstrom v. Justice Court*, the Arizona Supreme Court attributed much of the general fear experienced by affected motorists—a factor that ultimately tipped the scales against the Government—to the government's failure to publicize its roadblock before setting it up.<sup>35</sup> Similarly, in *Commonwealth v. McGeoghegan*, the Massachusetts Supreme Court found that "[a]dvance publication of the date of the intended roadblock, even without announcing its precise location, would have the virtue of reducing surprise, fear and inconvenience. [Accordingly, this] ... procedure may achieve a degree of law enforcement and highway safety that is not reasonably attainable by less intrusive means."<sup>36</sup> Apparently, an announcement that a roadblock to detect drunk drivers will be set up at some time on a certain day or group of days will suffice. The courts perceive that this announcement will help to discourage drunk driving, will lessen the anxieties of affected motorists, and will create a safer, less intrusive checkpoint for everyone involved. A good roadblock program will reflect all of these objectives.

### The Role of the Prosecutor

The prosecutor or trial counsel is a key figure in any roadblock case. His or her first contribution should be to help to develop the procedures discussed above, working closely with law enforcement officials to create a constitutionally healthy plan. Additionally, when a roadblock results in an apprehension, the prosecutor should review the procedures with the participating officers before going into court to ensure that the officers are familiar with the procedures and that they actually followed them. Moreover, because the Government must prove that written procedures existed and were disseminated to field

<sup>32</sup>In Michigan, contact officers also gave each driver a pamphlet explaining in further detail the workings of the roadblock. A motorist could record his or her comments about the roadblock on a questionnaire card attached to the booklet and mail it in to the state.

<sup>33</sup>440 U.S. at 664.

<sup>34</sup>*State v. Coccoma*, 427 A.2d 131 (N.J. Super. Ct. App. Div. 1980) (holding that stopping every fifth car was proper).

<sup>35</sup>663 P.2d 992 (Ariz. 1983).

<sup>36</sup>*Commonwealth v. McGeoghegan*, 449 N.E.2d 349, 353 (Mass. 1983).

officers before the roadblock was set up, the prosecutor should call witnesses to establish this. The Government apparently need not identify the actual written procedures in court and the prosecutor should not volunteer to do so. To bring the written procedures into court invites the defense counsel to review them in detail with each witness. This questioning probably would reveal minor deviations from the departmental standard that could give a skilled defense counsel an opening to argue that field officers failed to follow essential procedures.

Although *Sitz*<sup>37</sup> allows law enforcement agents to perform roadblock searches, a roadblock search typically is conducted without the sanction of a warrant. Accordingly, the Government must prove that field officers performed a roadblock search lawfully under a recognized exception to the Fourth Amendment warrant requirement.<sup>38</sup> The prosecutor should be prepared to offer evidence or testimony about all the following matters:

(1) the manner in which law enforcement officials selected the roadblock site and the data that was available to them about the site before they established the roadblock;<sup>39</sup>

(2) how the law enforcement agency conveyed its written roadblock procedures to the participating field officers;<sup>40</sup>

(3) the purpose of the roadblock;<sup>41</sup>

(4) the "compelling state interest" that justified the roadblock;<sup>42</sup>

(5) how the law enforcement agency publicized the roadblock before setting it up;<sup>43</sup>

(6) the data the agency collected about the roadblock operation, such as the number of vehicles that officers stopped, the number of arrests, and the average length of each stop;<sup>44</sup>

(7) confirmation that field officers applied the written procedures consistently to all vehicles;<sup>45</sup> and

(8) the steps that the law enforcement agency took to minimize the intrusion on motorists' pri-

vacy and to maximize the safety of all individuals involved.<sup>46</sup>

If a prosecutor fails to offer evidence on any of these points, the defense counsel could argue that the Government failed to prove that point and might succeed in distinguishing *Sitz*.

At trial, the prosecutor must counsel police officers to answer all questions honestly, including the defense counsel's questions about the purpose of the roadblock. Neither a judge, nor a jury, looks kindly on a police officer who comes across as dishonest or sneaky. Attempting to present a sobriety roadblock to the court as a driver's license and registration check<sup>47</sup> or a safety check<sup>48</sup> not only will ruin the officer's credibility, but also may cause the court to suppress the Government's evidence.

Finally, prosecutors should take care to prove that the person arrested for driving under the influence actually did appear to be under the influence of intoxicants. The roadblock is a proper tool for stopping motorists for a brief examination. Once a police officer has determined that a driver is exhibiting signs of intoxication, however, and has referred him or her to a secondary checkpoint, the evidentiary basis for further investigation should be the same as in any other DUI case. As the Court pointed out in *Sitz*, "the detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard."<sup>49</sup>

### A Defense Perspective

*Sitz* clearly establishes the validity of roadblock checkpoints. Moreover, the Supreme Court has held in other decisions that the "operation of fixed checkpoints need not be authorized in advance by a warrant."<sup>50</sup> A defense counsel, however, need not run up the white flag when confronted with evidence obtained at a roadblock stop. Indeed, the absence of a warrant requirement actually may work to the defendant's advantage. When a warrant has been issued in a particular case, a reviewing court normally will uphold the warrant, absent an abnormal abuse of discretion or a mistake of monumental propor-

<sup>37</sup>*Sitz*, 110 S. Ct. at 2481.

<sup>38</sup>See *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

<sup>39</sup>*Sitz*, 110 S. Ct. at 2484.

<sup>40</sup>*Id.*

<sup>41</sup>See *Ekstrom*, 663 P.2d at 994.

<sup>42</sup>*Martinez-Fuerte*, 428 U.S. at 555.

<sup>43</sup>*State v. Muzik*, 379 N.E.2d 599 (Minn. App. 1985).

<sup>44</sup>*State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984).

<sup>45</sup>*State v. Crom*, 383 N.W.2d 461 (Neb. 1986).

<sup>46</sup>*Commonwealth v. Leninsky*, 519 A.2d 984 (Pa. Super. Ct. 1986).

<sup>47</sup>*Ekstrom*, 663 P.2d at 995.

<sup>48</sup>*Muzik*, 379 N.W.2d at 603.

<sup>49</sup>*Sitz*, 110 S. Ct. at 2485.

<sup>50</sup>*Camara v. Municipal Court*, 387 U.S. 523 (1967).

tions. The combination of postdetention judicial reviews mentioned in *Sitz*<sup>51</sup> and the burden of proof borne by the Government puts a defense counsel on a firm footing as he or she begins a roadblock case.

The first thing defense counsel should do in a motion to suppress evidence in a roadblock case is very simple. He or she either should ask the Government to stipulate that the evidence was obtained in a warrantless search or should call the arresting officer and ask one question: "Did you stop and investigate my client without a warrant to do so?" In either case, the defense demonstrates the absence of a warrant and the burden shifts to the Government to justify the warrantless stop.

Bearing in mind the limited scope of *Michigan v. Sitz*,<sup>52</sup> a defense counsel should determine whether the instant case is factually distinguishable. The first area the defense attorney should investigate is the purpose of the roadblock. As mentioned above, courts commonly allow roadblocks that are designed to deter drunk driving, but are not so tolerant when a roadblock's main purpose is to snare drunk drivers and to produce evidence for their arrests and prosecutions.<sup>53</sup> Nor are courts likely to sanction roadblocks set up under the false pretext of safety or license checks. A defense counsel can approach the arresting officers in one of two ways. He or she could ask each officer to describe the purpose of the roadblock operation. If the prosecutor has failed to brief the officers properly, one or more of them may testify that the operation's sole purpose was to arrest drunk drivers, rather than to deter them. Alternatively, the defense counsel could ask the witnesses directly, "This roadblock was set up to detect drunk drivers, was it not?" Although a "yes" answer would be acceptable, some officers, feeling that a nobler answer is called for, may offer the safety review or license check as the reason for the checkpoint. Taken alone, this *faux pas* may not defeat the Government, but combined with other discrepancies it could result in the exclusion of the evidence.

The defense attorney also should concentrate on the procedures and guidelines of the police department that conducted the checkpoint. As mentioned above, the prosecutor must establish that these guidelines exist and that the police actually followed them. The defense counsel's best weapon to disprove these lines of testimony may be a copy of the regulations themselves. He or she should ask the officer testifying about these rules to produce a copy. A prosecutor will be hard pressed to convince the court of the irrelevancy of the very item that he or she is trying to prove exists. Armed with the guidelines, a

defense counsel can demonstrate through cross-examination of a poorly prepared witness that the officers conducting the roadblock either did not know the rules or willfully failed to follow them. Evidence of either will give credence to the argument that the field officers exercised a fair amount of discretion in enforcing the roadblock. The more discretion the officers had, the less likely the court is to find the roadblock constitutional.<sup>54</sup>

If the police at the roadblock stopped every car, defense counsel will be hard pressed to prove that they stopped his or her client at random. If traffic was sufficiently heavy, however, the police occasionally may have had to relieve congestion by allowing a series of drivers to pass through unchecked. If so, the defense can argue that the accused was the target of a random stop. The Supreme Court expressed its disapproval of random stops in *Delaware v. Prouse*, condemning them as "standardless and unconstrained discretion" and "the [kind of] evil the court ... discerned when in previous cases it ... insisted that the discretion of the official in the field be circumscribed ...."<sup>55</sup>

Finally, the defense counsel should concentrate on the specific indicia that caused the police to single out the accused from all the other drivers passing through the roadblock. Defense counsel should remember that *Sitz* merely provides the police with a vehicle for stopping drivers without probable cause. As Chief Justice Rehnquist commented, "It is important to recognize what our inquiry is *not* about. No allegations are before us of unreasonable treatment of any person after an actual detention at a particular checkpoint."<sup>56</sup> Accordingly, the defense attorney should ask the detaining officer what experience he or she has in detecting drunken drivers and what "articulable facts" led him or her to zero in on one particular driver—the accused. The officer's own previous testimony about the speed with which the police moved the traffic along may call into question the officer's ability to assess a driver's level of intoxication.

Overall, the defense counsel must remember that the Government bears the burden of going forward in most of these areas. The defense generally need not attempt to refute any matter that the prosecutor neglected to raise.

### Conclusion

The Supreme Court has laid to rest any doubts about the constitutionality of DUI roadblock stops. Little doubt exists, however, that police conduct that does not adhere to the standards set down in *Michigan v. Sitz* will not be tolerated.

<sup>51</sup>*Sitz*, 110 S. Ct. at 2485.

<sup>52</sup>*Id.*

<sup>53</sup>*Ekstrom*, 663 P.2d at 992.

<sup>54</sup>*State v. Jones*, 483 So. 2d 433 (Fla. 1986).

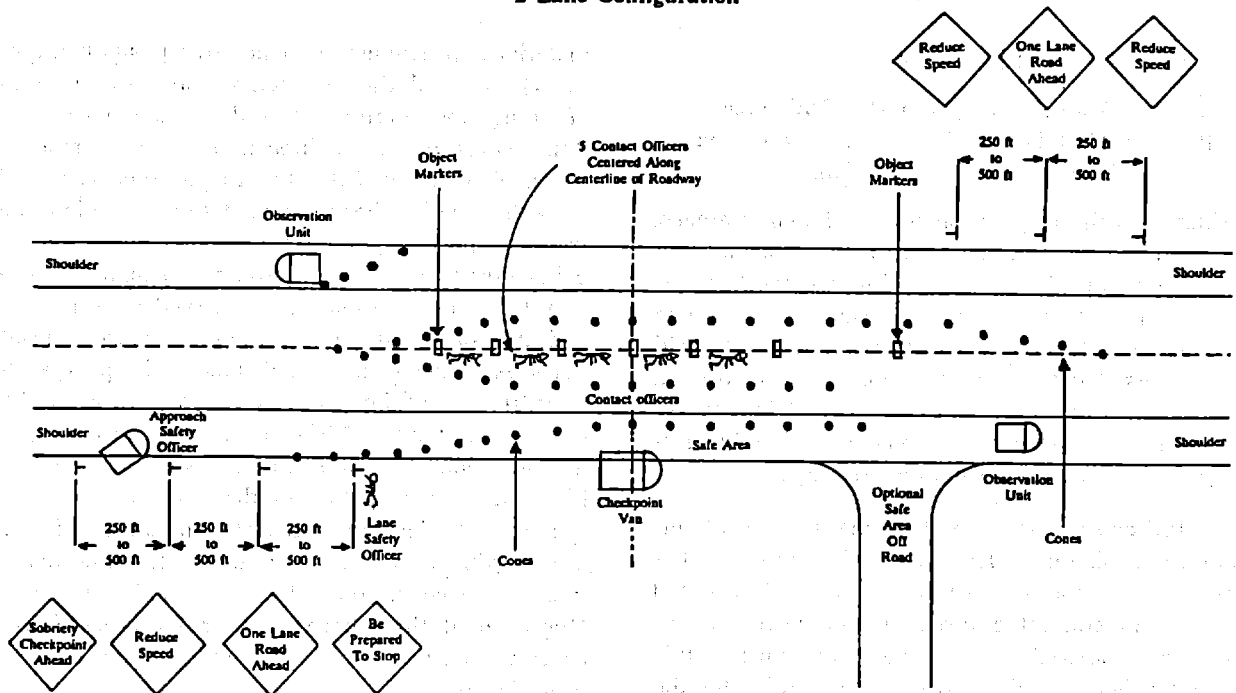
<sup>55</sup>*Prouse*, 440 U.S. at 661.

<sup>56</sup>*Sitz*, 110 S. Ct. at 2485 (emphasis added).

## Appendix A

### Sobriety Checkpoint

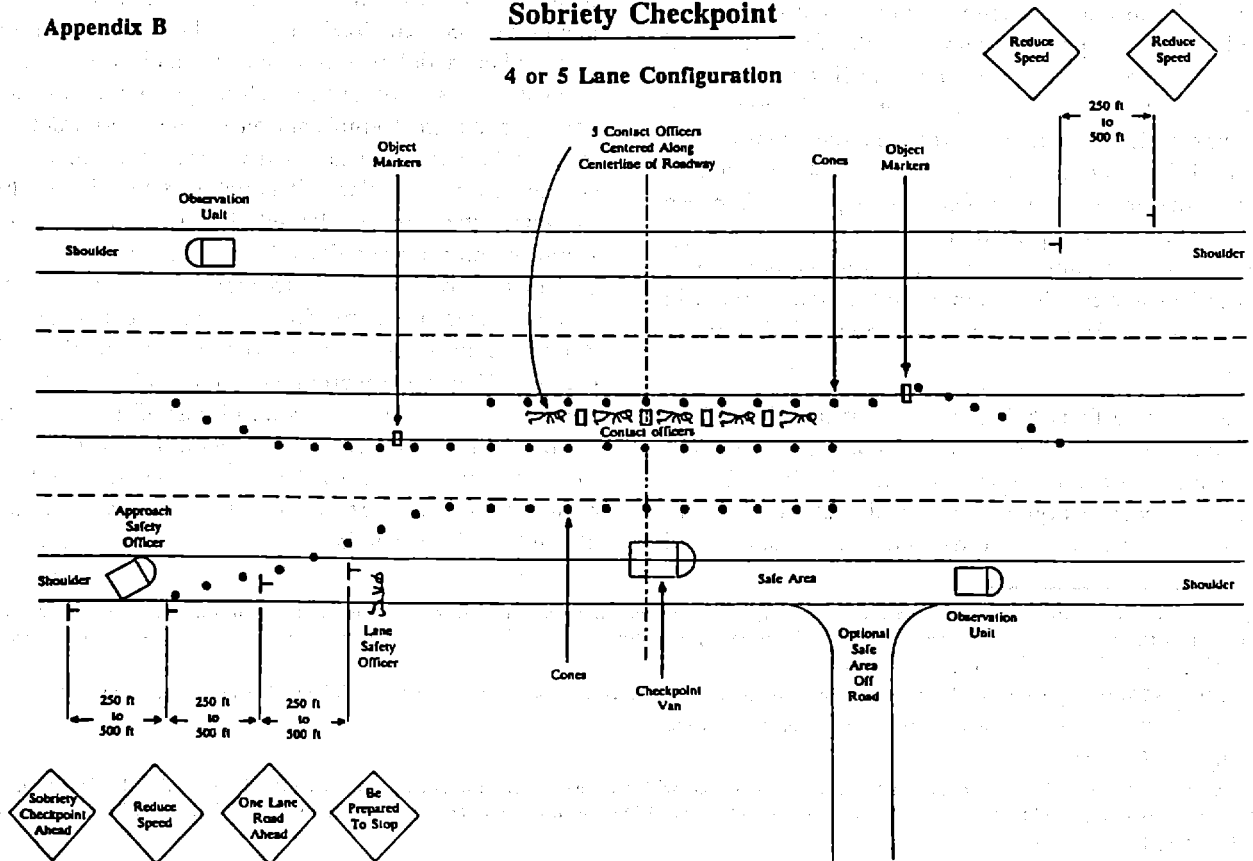
#### 2 Lane Configuration



## Appendix B

### Sobriety Checkpoint

#### 4 or 5 Lane Configuration



# USALSA Report

United States Army Legal Services Agency

## The Advocate for Military Defense Counsel

### DAD Notes

#### Discovery, Due Process, and Due Diligence: The Process That Is Due May Depend on What the Defense Counsel Has Done

Consider the following scenario. Two female trainees, Private *B* and Private *E*, testify at a court-martial that they got drunk and passed out at a drill sergeant's apartment. They claim that the drill sergeant and his friend then had sex with them without their consents. The drill sergeant admits that the trainees were in his apartment, but claims that he did not engage in sexual intercourse with them. The drill sergeant is convicted of raping Private *B* and of indecently assaulting Private *E*.

Before the court-martial, both trainees were administered polygraph tests. The results implied that the trainees were not speaking truthfully when they stated that they had not consented to sexual intercourse with the drill sergeant. The trial defense counsel discovered this before trial. What he failed to discover until after the trial, however, was a statement Private *B* had made to the polygrapher after the test. Specifically, she stated that she did not feel she was a victim of rape because she had enjoyed sex with appellant and that she felt she could have done something to prevent the drill sergeant from having sex with her if she had wanted to. Although the trial counsel also was ignorant of this statement before trial, the defense counsel claims in his posttrial submissions that the appellant was denied due process because the Government never provided the defense with a copy of the polygraph results, nor did it inform the defense of the alleged rape victim's statement to the polygrapher, in response to the defense counsel's general discovery request.

These were the facts behind the recent decision of the Army Court of Military Review in *United States v. Simmons*.<sup>1</sup> Citing *Brady v. Maryland*<sup>2</sup> and *Giglio v. United States*,<sup>3</sup> the accused argued on appeal that the Government's failure to disclose the existence of favorable and

material impeachment evidence (the postpolygraph statement) violated the accused's due process rights. In affirming the findings of guilty and the sentence, the Army court arrived at three rather controversial conclusions. First, it found that the alleged rape victim did not deny that she had been raped, stating, "We interpret Private *B*'s post-polygraph statements not as a denial of being raped, but as the victim's explanation concerning why the polygraph may have showed deception."<sup>4</sup> Second, the court held that because the defense counsel "did not seek to delve into the details of the polygraph until after trial," he failed to exercise "due diligence" to discover the statements.<sup>5</sup> The court added, however, that the defense counsel's failure to exercise "due diligence" in his pretrial investigation of the case did not "raise the spectre of inadequate representation as his action is consistent with his tactics at trial, i.e., to show that sexual intercourse never took place."<sup>6</sup> Finally, the court was "convinced that there is no reasonable doubt that appellant would have been convicted had the evidence been disclosed."<sup>7</sup>

The Army court's conclusions sharply narrowed the boundaries of what may be considered material impeachment evidence that *Brady* requires the Government to disclose when a defense counsel has made only a general request for discovery.<sup>8</sup> In reaching these conclusions, the court placed great emphasis on the accused's defense at trial. Noting that the accused claimed that sexual intercourse never took place, it concluded that impeachment evidence attacking the alleged victim's nonconsent to sex would be only marginally relevant. The court's bare conclusions, however, failed to recognize that trial tactics and defenses are a product of the information that a defense counsel receives before trial about the offense charged. Had the Government disclosed Private *B*'s statements, or had the defense counsel been diligent enough to obtain them, the defense hardly would have ignored significant impeachment evidence that related directly to an element of proof of the offense. Knowledge of the alleged victim's admission to the polygrapher probably

<sup>1</sup>33 M.J. 883 (A.C.M.R. 1991). In *Simmons* a defense counsel asked the Government to disclose "any and all information in the Government's possession or in the possession of government agents, informants, or police officials that might be favorable to the defense within the meaning of *Brady v. Maryland*." *Id.* at 885 (citation omitted).

<sup>2</sup>427 U.S. 97 (1976) (the Government's failure to disclose material evidence favorable to the accused violates due process guarantees).

<sup>3</sup>405 U.S. 150 (1972) (*Brady* rule encompasses impeachment evidence).

<sup>4</sup>*Simmons*, 33 M.J. at 886.

<sup>5</sup>*Id.* Federal courts have held that evidence that could be discovered with any reasonable diligence need not be disclosed under *Brady*. See *Jarrell v. Balkcom*, 735 F.2d 1242, 1258 (11th Cir. 1984), cert. denied, 471 U.S. 1103 (1985); *United States v. Campagnuolo*, 592 F.2d 852, 861 (5th Cir. 1979).

<sup>6</sup>*Simmons*, 33 M.J. at 886 n.3.

<sup>7</sup>*Id.* at 886.

<sup>8</sup>*Cf.* *Carter v. Rafferty*, 826 F.2d 1299 (3d Cir. 1987) (holding undisclosed oral reports of the polygraph examination conducted on key government witness that had an impact on his credibility to be "material" under *Brady*).

would have made even the dullest defense attorney reconsider the feasibility of defending the accused solely on the theory that sexual intercourse never occurred. Under these circumstances, the Army court's determination that the defense counsel failed to exercise "due diligence" to obtain Private B's statements actually would seem to "raise the spectre of inadequate representation," regardless of the defense counsel's choice of tactics at trial.

Moreover, whether one interprets Private B's remark that she did not feel she was a victim of rape as a denial of being raped or as an explanation of why the polygraph may have shown deception—which appears to be a distinction without a difference if one is considering the remark for its impeachment value—this statement directly contradicts Private B's testimony at trial that she thought she was raped. Private B's testimony was critical to the Government's case on the rape charge and her credibility had to be a crucial issue for the court members. With no basis other than speculation to determine how Private B's statements would have affected the defense counsel's trial tactics or how Private B would have responded to cross-examination regarding her inconsistent statements, the Army court's assertion that "there is no reasonable doubt" that the accused would have been convicted had the evidence been disclosed seems somewhat shortsighted.

Nevertheless, this case places trial defense counsel on notice that general discovery requests for favorable evidence may not be sufficient to obtain all material evidence pertaining to the trial. Counsel must investigate diligently all leads relating to the government's evidence and must attempt to obtain directly all the information that has been made available for review. Captain Boyd.

#### **Disciplining Children Without Getting Slapped With a Court-Martial**

The question of whether a parent has used excessive force to discipline a child often proves to be quite sensitive and troubling. In the "old days" when parents, lawyers, and judges were young, the use of a belt, paddle, or hickory switch to spank a child was not uncommon. Most of us, however, recognize that what once may have been a typical punishment for a child's wrongdoing now may lead to scorn within the community or even to court-martial. Nevertheless, a recent decision of the Army

Court of Military Review indicates that a parent still may use reasonable and moderate force—which may include grandad's old leather belt—to discipline his or her child, as long as the parent's motive in disciplining the child is proper.

In *United States v. Scofield*,<sup>9</sup> the Army court scrutinized the appellant's conduct in light of Model Penal Code standards concerning parental discipline and concluded that the appellant had acted for proper purposes and had used a moderate and reasonable degree of force.<sup>10</sup> Consequently, the conviction and discharge of a soldier with over eighteen years of service was reversed.

The Model Penal Code employs a two-prong test for examining parental discipline. The Code states that the use of force by parents is justifiable if:

(a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his [or her] misconduct; and

(b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation ....<sup>11</sup>

If both prongs of the Model Code are satisfied, the so-called proper parental discipline defense should shield a parent from charges of battery without subjecting the child to the risk of an improper and excessive use of force.<sup>12</sup>

In *Scofield*, the appellant pleaded guilty to using excessive force when he punished his eight-year-old son and six-year-old daughter by spanking each of them between five and ten times on the buttocks and backs of their legs with a leather belt. During the providence inquiry, however, appellant revealed that he had spanked the children only after all other attempts to correct their misbehaviors had failed. The appellant stated that his son repeatedly came home late from school and that "[a]fter speaking with him about it and trying to influence his behavior through various punitive measures like going to bed early [and] withdrawal of privileges, [the appellant had] felt that [he] had to [spank his son] ... to get him to understand that he should comply ...."<sup>13</sup>

<sup>9</sup>33 M.J. 857 (A.C.M.R. 1991).

<sup>10</sup>The Court of Military Appeals made the Model Penal Code's provisions on child discipline applicable to the military in *United States v. Brown*, 26 M.J. 148 (C.M.A. 1988).

<sup>11</sup>Model Penal Code § 3.08(1) (Proposed Official Draft 1962).

<sup>12</sup>*Scofield*, 33 M.J. at 860 (citing R. Perkins & R. Boyce, *Criminal Law* (3d ed. 1969); *Campbell v. Commonwealth*, 405 S.E.2d 1 (Va. App. 1991) (parents may discipline children within bounds of moderation and reason); *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648 (1971) (parent may spank child who misbehaved without being liable for battery)).

<sup>13</sup>*Id.* at 861.

Similarly, the appellant's daughter had stolen earrings from her babysitter and, as an alternative to punishment, the appellant had given his daughter two days to return the earrings. After the two days passed, however, she had failed to return the earrings and displayed little concern about the situation. Consequently, the appellant testified that he then

sat her down and discussed with her why [he] was going to spank her; because she had stolen something and lied to [him] about the intent and circumstances surrounding the theft of the earrings. [The appellant] wasn't angry with her; [he] was disappointed with her behavior, or angry with her behavior. So [appellant] decided at that time that spanking her was a reasonable punishment for stealing and lying.<sup>14</sup>

Because the appellant indicated that he had spanked his children with a belt only after other disciplinary means had failed, that he had done so only out of parental concern, and that he did not harbor a malicious desire to inflict pain upon his children, the Army court held that the appellant's motive in spanking them was proper.<sup>15</sup> The court, however, noted that a parent's motive in disciplining a child is clearly a question of fact, pointing out that, if evidence in a future case reveals an accused's general dislike of his or her child or demonstrates that he or she punished the child during a fit of anger or immediately after the child's misbehavior, the court well might arrive at a different conclusion than it reached in *Scofield*.<sup>16</sup> If the court finds an improper motive, it could conclude that the punishment violates the Model Penal Code provisions and could find that the parent's claim of a disciplinary intent does not provide a defense for the accused's actions.

Even if the court finds a "proper" motive for a disciplinarian's actions, the defense will fail if the force used was excessive.<sup>17</sup> The *Scofield* court recognized that the drafters of the Model Penal Code intended to protect a properly motivated disciplinarian unless he or she "culpably creates substantial risk of the excessive injuries ..." specified [in the second prong of the test].<sup>18</sup> The court, however, noted that

under some circumstances, a parent who acts with a bona fide parental purpose may lawfully punish his or her child for misconduct by striking him or her on the buttocks and back of his or her legs with a belt with sufficient force that welts and bruising are an unintended result.<sup>19</sup>

Although the appellant stated that he regretted the force he used in disciplining his children and admitted that, in hindsight, he believed that his use of force had been excessive, the court held that the evidence of record did not support that conclusion as a matter of law.<sup>20</sup> Rather, the court relied on a pediatrician's testimony that the injuries to the appellant's daughter could not be categorized unequivocally as serious despite her "fairly extensive" bruising.<sup>21</sup> Moreover, based on its own review of the photographic evidence of injuries, the court was unwilling to hold that the photographs satisfied the "extreme force" or "extensive injury" standards of the Model Penal Code.<sup>22</sup>

The *Scofield* decision should place both trial and defense counsel on notice of the available defenses to alleged excesses in parental discipline and the importance of medical testimony concerning the extent of a child's injuries. Advising your client to plead guilty to charges of assault consummated by battery under facts similar to those in *Scofield* might invite a spanking by the appellate courts. Captain Carey.

#### Article 134 Catches Some Misconduct, Not All of It

The Army Court of Military Review recently reaffirmed the old military legal axiom that article 134 of the Uniform Code of Justice (UCMJ) is not a "catchall" as to make every irregular, mischievous, or improper act, a court-martial offense.<sup>23</sup> The requirement in UCMJ article 134 for a "direct and palpable" prejudice to good order and discipline means that conduct "must be easily recognizable as criminal, must have a direct and immediate adverse impact on discipline, and must be judged in the context surrounding the acts."<sup>24</sup>

The case in which the Army court recently reaffirmed this axiom involved a male staff sergeant who photographed a female lieutenant in the nude during their sexual affair.<sup>25</sup> They later ended their affair and the

<sup>14</sup>Id.

<sup>15</sup>Id.

<sup>16</sup>Id. at 860 (discussing *United States v. Brown*, 26 M.J. 148 (C.M.A. 1988), in which the Court of Military Appeals found that sufficient evidence existed to show an improper motive for discipline because the parent disliked the child, was venting his hostility, and was generally angry on the day in question).

<sup>17</sup>Id. at 861-62.

<sup>18</sup>Id. at 861 (quoting Model Penal Code § 3.08(1) commentary at 139 (1985)).

<sup>19</sup>Id. at 862 (citing *State v. DeLeon*, 813 P.2d 1382 (Haw. 1991)). No protection will exist for an improperly motivated parent who inflicts similar welts and bruises. See *Brown*, 26 M.J. at 150-51.

<sup>20</sup>*Scofield*, 33 M.J. at 863.

<sup>21</sup>Id.

<sup>22</sup>Id.

<sup>23</sup>*United States v. Sadinsky*, 34 C.M.R. 343 (C.M.A. 1964).

<sup>24</sup>*United States v. Henderson*, 32 M.J. 941 (N.M.C.M.R. 1991).

<sup>25</sup>*United States v. Warnock*, CM 8900191, 1991 WL 285750 (A.C.M.R. 31 Dec. 1991).

lieutenant began another affair with a private first class. The staff sergeant, however, kept the negatives of the nude photographs and he later showed them to the private and bragged about his "accomplishment." This was the conduct the Government charged as "wrongful."

At the staff sergeant's court-martial, the private testified that he had not been offended when the staff sergeant showed him the negatives of his lover in the nude. The private added that he had regarded his own relationship with the lieutenant as purely sexual, rather than romantic or social. The most effective evidence the Government could offer to establish prejudice to good order and discipline was the testimony on cross-examination of a first sergeant, who "guess[ed]" that the accused's conduct "would [tend to] ... discredit [the accused's] leadership within the unit ...."<sup>26</sup>

The Army court identified two theories upon which the Government might have predicated prejudice to good order and discipline: "first, diminished respect for [the lieutenant as an officer], and second, diminished respect for the appellant as a noncommissioned officer."<sup>27</sup> The court, however, found that prejudice to good order and discipline could not be predicated on diminished respect for the officer because she already had destroyed her authority and entitlement to respect from both of her paramours.<sup>28</sup> The court also refused to find that the accused had diminished respect for himself. Dismissing the first sergeant's testimony on cross-examination as too speculative, the court held that no enlisted soldier other than the private could have "had diminished respect" for the accused, "because the [accused had] shown the negatives only to [the private]."<sup>29</sup> The court then noted that the private had testified that he was unaffected by the accused's conduct and stated that it could find "nothing in [his] testimony from which [it could] infer that his respect for the appellant was diminished."<sup>30</sup>

The procedural aspects of the case bound the court to conduct only a legal review.<sup>31</sup> Nevertheless, the court's

analysis clearly shows that the Government must prove a direct and palpable prejudice to good order and discipline. The Government may focus on either the victim or the accused, but the impact on good order and discipline must be proved. A defense counsel should keep this requirement in mind when he or she assesses the merits of the charge and again during the trial itself, to ensure the Government meets its burden. Captain Keable.

#### "Expert" Testimony in Child Abuse Cases— Commenting on Credibility

The Army Court of Military Review recently addressed two critical issues dealing with expert testimony in child abuse cases. In *United States v. King*,<sup>32</sup> the Army court held that a military judge did not err by permitting an expert witness to testify about the credibility of a child victim when the expert witness testified generally about the ability of children to fabricate, but never actually stated that the child victim himself was credible.<sup>33</sup> The court also held that the military judge did not err in allowing the Government's expert to testify both on the merits and during presentencing about matters that the appellate counsel maintained were beyond her expertise.<sup>34</sup> The Court of Military Appeals subsequently granted the accused's petition for grant of review and final briefs have been filed on behalf of both the accused and the Government.<sup>35</sup>

In *King*, the Government called Dr. Donna Sherrouse on the merits and again during presentencing as an expert in child abuse.<sup>36</sup> She testified that she owned the Montessori Children's House in the local community, had testified extensively as an expert in child abuse, had a doctorate in education with emphasis on learning disabilities, and had two master's degrees in education and school psychology. She specialized in diagnostic activities for children. On the strength of these credentials, she was qualified as an expert without defense objection, and testified as follows:

<sup>26</sup>*Id.*, 1991 WL 285750, at \*1.

<sup>27</sup>*Id.*, 1991 WL 285750, at \*2.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>The case was referred to the Army Court of Military Review under the provisions of UCMJ art. 69(d)(1). See Uniform Code of Military Justice art. 69(d)(1), 10 U.S.C. § 869(d)(1) (1988) [hereinafter UCMJ].

<sup>32</sup>32 M.J. 709 (A.C.M.R. 1991), *pet. for review granted*, 34 M.J. 23 (C.M.A. 1991).

<sup>33</sup>*Id.* at 713.

<sup>34</sup>*Id.*

<sup>35</sup>*United States v. King*, 34 M.J. 23 (C.M.A. 1991). The Court of Military Appeals granted review to consider the following issues:

#### I

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN ALLOWING, OVER DEFENSE OBJECTION, EXPERT TESTIMONY CONCERNING THE CREDIBILITY OF THE CHILD VICTIM.

#### II

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN ALLOWING AN EXPERT WITNESS TO TESTIFY INVOLVING MATTERS BEYOND HER EXPERTISE.

*Id.*

<sup>36</sup>*King*, 32 M.J. at 713 (A.C.M.R. 1991).

Q: Ma'am, what does the—literature in your profession suggest about whether children of the age five are capable of fabricating any or all of this?

A: Basically, the literature—

CDC: I object to that, Your Honor. Opinion as to whether or not the witness is being truthful, that's a question for the jury.

TC: Your Honor, we're speaking in general terms of whether the witness—whether the literature suggests a propensity for general witnesses making this up and this—in this age group of five.

MJ: The objection is overruled. You may proceed.

Q: Ma'am, again, do five year olds make this up?

A: No, they do not. They lack the sophistication to describe, anatomically correct [sic], the parts of the body; they have had no experience, we hope, with issues such as ejaculation; they would not know about the issues surrounding sexual activity unless they had been involved in a concrete way. So they don't have abstract ability that it would take to make up a story and then also make up events to match it. If I can use an example, a child could not say, he hurt [sic] my tail, which is a real common outcry with a child, and then, four hour [sic] later or six hours later, scream when you put them in the bathtub or cry when they use the bathroom because it burns when they urinate. They don't have the ability to match those two things and say, a ha, I've got to pull this story together. See, they just can't do that.

Q: At what age do children normally form that opinion—or, that ability?

A: You—again, the literature would say you'd have to have at least a twelve year old intellectual level to begin to abstract out and think through and pull a story together that was that fanciful and understand that you've got to have physical characteristics that match activities. It would just—you could have a teenager lie about this because they [sic] were angry about curfews or—hated the stepfather, but not a five year old.

TC: Nothing further, Your Honor.

During presentencing, Dr. Sherrouse testified that the appellant was a regressive pedophile. She then described the typical behavioral patterns of regressive pedophiles, stating that they were highly likely to continue to abuse children.<sup>37</sup>

The Court of Military Appeals has held consistently that child abuse experts may not render opinions about the credibility of victims or other witnesses.<sup>38</sup> The issue of a witness's credibility historically has been left to the jury, not to the expert witness.<sup>39</sup> In the instant case, the trial counsel asked Dr. Sherrouse whether five-year-olds make up incidents like the one alleged at trial. When she answered, "No, they do not," she essentially said, "I believe the child." Practically speaking, the current standard that the Court of Military Appeals has articulated for identifying permissible expert testimony is a distinction without a difference. It represents yet another deviation from the traditional rules of evidence in the well-intended, yet misguided, pursuit of alleged child abusers.<sup>40</sup> Trial defense counsel should object vehemently to expert testimony about the general credibility of child abuse victims—particularly now, pending the Court of Military Appeals' resolution of the *King* case.

Doctor Sherrouse also testified on sentencing that the accused is a "regressive pedophile." This testimony was extremely prejudicial, inflammatory, and factually unsubstantiated. The Army court conceded that Dr. Sherrouse's opinion testimony was related only minimally to her acknowledged expertise in child sexual abuse. Doctor Sherrouse never interviewed the accused, nor did she speak with anyone in his family, yet she still labeled him a pedophile in her testimony before the court-martial panel. Doctor Sherrouse's testimony clearly was more prejudicial than probative. Again, trial defense counsel must object to the qualifications of experts in child abuse cases, challenging the foundational bases for their testimonies under Military Rule of Evidence 702, and the probative—versus prejudicial—natures of their testimonies under Military Rule of Evidence 403. Captain Desmarais.

### **When Willful Disobedience Becomes Breaking Restriction: "I Order You Not to Violate My Order!"**

The following scenario is not uncommon for trial defense attorneys. Your client is charged with failure to

<sup>37</sup>*Id.* at 711.

<sup>38</sup>See *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988); *United States v. Peterson*, 24 M.J. 283 (C.M.A. 1987); *United States v. Deland*, 22 M.J. 70 (C.M.A. 1986), *cert. denied*, 107 S. Ct. 196 (1986); *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985).

<sup>39</sup>See, e.g., *United States v. Barnard*, 490 F.2d 907 (9th Cir. 1973) ("Competency is for the judge, not the jury. Credibility, however, is for the jury—the jury is the lie detector in the courtroom.").

<sup>40</sup>See, e.g., *United States v. Tolppa*, 25 M.J. 352 (C.M.A. 1987) (holding that an expert may testify about a child's ability to separate truth from fantasy or may discuss various patterns of consistency in stories of child sexual abuse victims and compare those patterns with patterns in the victim's story).

obey his commander's order. You discover that, because your client was experiencing severe domestic problems, his commander had moved him into the barracks and had restricted him to post until things cooled off. The trial counsel tells you that after the restriction was imposed, your client repeatedly expressed his desire to leave post to confront his spouse and that his exasperated commander then ordered him not to break the restriction. Sadly, despite this reminder, your client left the installation. He tells you, however, that he never intended to disobey his commander's order. Actually, he never went to his off-post quarters, but merely left post to get a hamburger at his favorite restaurant. Your client believes that his misconduct more accurately reflects a breach of restriction—not willful disobedience of his commander's order. What should you advise?

Your immediate task is to determine the ultimate offense that your client has committed.<sup>41</sup> You may consider various factors that will help you determine the ultimate offense. Chief among these are the commander's motivation in issuing the order and the level of defiance that marked the accused's violation of that order. In *United States v. Loos*,<sup>42</sup> the court, in dicta, established precedent for determining the command motivation to issue an order. The court stated that, by issuing an order, a superior officer "undeniabl[y]" can take the performance of a routine duty and "lift it above the common ruck."<sup>43</sup> The failure to perform that duty then could be punished as a failure to obey.

Despite this "undeniable" power, in *United States v. Quarles*,<sup>44</sup> the court proscribed the giving of an order simply to "escalate the punishment to which an accused otherwise would be subject for the ultimate offense involved." Subsequent decisions demonstrate the court's continued disapproval of the improper escalation of potential punishment.<sup>45</sup>

In addition to identifying the commander's motivation to order compliance with restriction, you must examine the facts and circumstances surrounding the disobedience of the order. In *United States v. Lattimore*,<sup>46</sup> the accused,

who then was restricted to the limits of the installation, approached his commander and asked that the restriction be lifted. When the commander discovered that the accused had broken restriction the previous day, he "re-emphasized" that the restriction remained in effect, "informed" the accused not to break restriction, and "told" the accused that the restriction would not be commuted at all.<sup>47</sup> The following day the accused broke restriction again when he went forty yards from the gate to talk with his girlfriend for a few minutes. The Army Board of Review found that the "requisite 'intentional defiance of authority'... was lacking under the circumstances" and held that the accused had violated UCMJ article 92, not article 90.<sup>48</sup> The court then held that the accused's misconduct was punishable merely as a breach of restriction because of the punishment limitations of footnote 5 to article 92.<sup>49</sup>

In *United States v. Caton*,<sup>50</sup> the Court of Military Appeals, summarily reversed an earlier decision of the Air Force Court of Military Review,<sup>51</sup> dismissing a charge of disobedience of a superior commissioned officer's order not to break restriction because the appellant also was charged with breach of restriction. The record revealed that, pursuant to nonjudicial punishment imposed under UCMJ article 15 in February 1986, Caton was restricted to post for a period of forty-five days. On 19 March 1986, Caton was spotted offpost and subsequently was ordered to meet with his commander. At this meeting, the commander advised Caton of his intent to impose additional nonjudicial punishment and gave Caton an "oral direction" not to depart the installation without permission as long as the restriction remained in effect.<sup>52</sup> Despite this express warning, Caton left the installation several hours later, and left again on the following day. The Air Force Court of Military Review determined that "it was clearly not error for the military judge to have concluded that, while the offenses would not be regarded as separately punishable, the more stringent Article 90, U.C.M.J., punishment would apply."<sup>53</sup> The Court of Military Appeals, however, disagreed with the lower court's conclusion, dismissing the article 90 offense after sum-

<sup>41</sup> "When the ultimate offense is found to be the underlying behavior as opposed to the willful disobedience of superior authority, the disobedience charge and specification are subject to dismissal." *United States v. Battle*, 27 M.J. 781, 783 (A.F.C.M.R. 1988) (citing *United States v. Peaches*, 25 M.J. 364 (C.M.A. 1987)).

<sup>42</sup> 16 C.M.R. 52 (1954).

<sup>43</sup> *Id.* at 55.

<sup>44</sup> 1 M.J. 231, 232 (C.M.A. 1975).

<sup>45</sup> See *United States v. Petterson*, 17 M.J. 69 (C.M.A. 1983); *United States v. Landwehr*, 18 M.J. 355 (C.M.A. 1984); cf. *Battle*, 27 M.J. at 786 (commenting on "the frustration inherent in attempting to determine the commander's motivation after the fact").

<sup>46</sup> 17 C.M.R. 400 (A.B.R. 1954).

<sup>47</sup> *Id.* at 401.

<sup>48</sup> *Id.*; see also UCMJ art. 90.

<sup>49</sup> *Id.* at 403; see also *Petterson*, 17 M.J. at 72 (holding that when an accused's acts demonstrate "express defiance of the orders," the disobedience "constitutes 'the ultimate offense committed'").

<sup>50</sup> 25 M.J. 223 (C.M.A. 1987).

<sup>51</sup> 23 M.J. 691 (A.F.C.M.R. 1986), *rev'd*, 25 M.J. 223 (C.M.A. 1987).

<sup>52</sup> *Id.* at 692.

<sup>53</sup> *Id.* at 693.

marily finding it to be multiplicitious with the article 134 offense.

The most recent opinion of the Court of Military Appeals on this issue came three months after the *Caton* decision. In *United States v. Peaches*,<sup>54</sup> the accused, having been released from confinement to which he had been sentenced at an earlier court-martial, was handed a written order to report for duty the following morning. The accused did not report for duty as ordered. The court held that his failure to report for routine duties was not willful disobedience of an order, but was an offense that "has long been prosecuted under Article 86 or its predecessors."<sup>55</sup> The court found no "environment of defiance" attended the accused's misconduct, noting that the command had not ordered Peaches to repair as a "measured attempt to secure [his] compliance with a previously defied routine order."<sup>56</sup> The court's decision did not refer to the earlier *Caton* decision.

Despite judicial guidance provided by case law, at the heart of every restriction is an order effecting that restriction.<sup>57</sup> Accordingly, in every case not involving heedlessness or forgetfulness,<sup>58</sup> once a soldier goes beyond the geographical limits of the restriction, he or she willfully has violated an order. Even so, because the Court of Military Appeals has commented on the need to examine the presence or absence of defiance, as well as the motivation behind the follow-up order, the following hypothetical situation may merit discussion.

Assume that soldiers *A* and *B* are restricted to post. Upon receipt of this bad news, soldier *A* protests vociferously and states that he will leave post at the next opportunity. After the commander dismisses him, *A* conforms his actions to his words and immediately leaves post. Soldier *B*, on the other hand, salutes his commander, exits the office, and waits a few hours before he too leaves post. Who was more willful in his disobedience? Should a court recognize degrees of

willfulness? In reality, did not both soldiers merely break restriction?

Suppose the commander decides to meet with *A* again before *A* has a chance to leave post. The commander, remembering that he must avoid the appearance of escalating punishment improperly, explains the need to prevent the erosion of the command structure upon which the military organization is based<sup>59</sup> and orders *A* to comply with the restriction. If *A* and *B* both subsequently break restriction, *A* faces five years of confinement and a dishonorable discharge, but *B* may be confined for only a month.<sup>60</sup>

Trial defense counsel should seek to convince the trial counsel, the command, and—if need be—the military judge that despite the perceived environment of willful disobedience that surely must accompany every knowing and voluntary breach of restriction, the ultimate offense is nothing more than a breach of restriction and should be punished accordingly. Captain Turney.

### *Clerk of Court Notes*

#### **Court-Martial Processing Times: Cases Down, but Processing Time Increases**

The accompanying tables of general court-martial (GCM) and bad-conduct discharge special court-martial (BCDSPCM) processing times for fiscal year (FY) 1991 show that the number of cases decreased an aggregate of twenty-seven percent from the preceding year. Nevertheless, pretrial processing time averages increased by seven percent for GCM cases and by ten percent for BCDSPCM cases. Posttrial processing time averages increased by almost twenty percent.

The increased processing times cannot be blamed entirely on Operations Desert Shield and Desert Storm. Pretrial processing times for Army Central Command (ARCENT) and Third Army were lower than those of most other major commands. Army Central Command's posttrial processing times, however, were generally higher, particularly during redeployment.

<sup>54</sup>25 M.J. 364 (C.M.A. 1987).

<sup>55</sup>*Id.* at 366.

<sup>56</sup>*Id.*

<sup>57</sup>Early case law recognized this principle. See *Lattimore*, 17 M.J. at 403 ("restriction is generally imposed by the direct, personal order of an officer to an enlisted man"); *United States v. Porter*, 28 C.M.R. 448 (A.B.R. 1959).

<sup>58</sup>See UCMJ art. 90.

<sup>59</sup>*Petterson*, 17 M.J. at 72.

<sup>60</sup>Compare Manual for Courts-Martial, United States, 1984, Part IV, para. 14e(3) with *id.*, para. 102e.

### General Courts-Martial

	FY 1989	FY 1990	FY 1991
Records received by Clerk of Court	1554	1558	1114
Days from charges or restraint to sentence	44	43	46
Days from sentence to action	53	52	62
Days from action to dispatch	6	6	7
Days enroute to Clerk of Court	11	9	10

### BCD Special Courts-Martial

Records received by Clerk of Court	497	458	350
Days from charges or restraint to sentence	29	30	33
Days from sentence to action	45	45	53
Days from action to dispatch	4	5	6
Days enroute to Clerk of Court	9	9	9

### Non-BCD Special Courts-Martial

	FY 1990	FY 1991
Records reviewed by staff judge advocates	293*	174
Days from charging or restraint to sentence	34	35
Days from sentence to action	33	43

### Summary Courts-Martial

	FY 1990	FY 1991
Records reviewed by staff judge advocates	1130*	903
Days from charging or restraint to sentence	14	12
Days from sentence to action	8	8

\*Last Three Quarters

### Court-Martial and Nonjudicial Punishment Rates

Rates per Thousand<sup>61</sup>

Fourth Quarter Fiscal Year 1991  
July-September 1991

	Armywide	CONUS	Europe	Pacific	Other
<u>GCM</u>	0.36	0.34	0.41	0.53	0.87
	(1.43)	(1.35)	(1.65)	(2.12)	(3.47)
<u>BCDSPCM</u>	0.18	0.19	0.14	0.29	0.00
	(0.70)	(0.78)	(0.54)	(1.17)	(0.00)
<u>SPCM</u>	0.03	0.04	0.04	0.00	0.17
	(0.13)	(0.14)	(0.16)	(0.00)	(0.69)
<u>SCM</u>	0.29	0.22	0.46	0.48	0.52
	(1.17)	(0.90)	(1.86)	(1.90)	(2.08)
<u>NJP</u>	21.97	23.45	21.80	24.73	33.63
	(87.87)	(93.80)	(87.21)	(98.93)	(134.51)

Note: Figures in parentheses are the annualized rates per thousand.

# **Military Justice Statistics, FY 1989-1991**

## General Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/enl	Drug Cases	Rate per 1000
1989	1585	94.5%	87.6%	62.6%	63.8%	24.9%	31.4%	2.08
1990	1451	94.9%	86.7%	60.8%	68.6%	20.2%	24.3%	1.94
1991	1173	94.5%	87.4%	58.0%	67.5%	18.1%	16.9%	1.56

## Bad-Conduct Discharge Special Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/enl	Drug Cases	Rate per 1000
1989	850	92.8%	62.6%	63.6%	69.2%	21.5%	26.3%	1.12
1990	772	92.6%	62.3%	64.3%	70.0%	21.2%	22.9%	1.03
1991	585	92.9%	64.8%	60.6%	69.9%	19.6%	12.4%	.79

## Other Special Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/enl	Drug Cases	Rate per 1000
1989	185	80.5%	N/A	40.0%	52.4%	36.2%	6.4%	.24
1990	149	75.8%	N/A	34.8%	57.0%	31.5%	3.3%	.20
1991	92	81.5%	N/A	45.6%	56.5%	27.1%	5.4%	.12

## Summary Courts-Martial

FY	Cases	Conv. Rate	Guilty Pleas	Drug Cases	Rate per 1000
1989	1365	94.6	Unknown	10.3%	1.79
1990	1121	95.0%	42.4%	7.8%	1.50
1991	931	92.2%	32.5%	5.4%	1.26

## Nonjudicial Punishment Rate

FY	Total	Formal	Summarized	Drugs	Rate per 1000
1989	83,413	79.9%	20.1%	9.9%	109.44
1990	76,152	79.0%	21.0%	6.0%	101.87
1991	60,269	79.7%	20.3%	4.7%	81.73

Average strength for rates per 1000: FY 1989, 762,233; FY 1990, 747,539; FY 1991, 737,424.

<sup>61</sup>These figures are based on average Army personnel strength of 737,180.

## TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

### Criminal Law Notes

#### Federal Sentencing Guidelines: Judge Who Intends to Depart Sua Sponte from Sentencing Range Must Notify Both Parties

In *Burns v. United States*<sup>1</sup> the United States Supreme Court decided by a vote of five to four that a district court may not "depart from the [Federal Sentencing] Guidelines sua sponte without first affording notice to the parties."<sup>2</sup> To judge advocates prosecuting felonies as special assistant United States attorneys (SAUSAs) this decision is important for at least two reasons. First, although the issue on appeal was the legality of a judge's upward departure from the Federal Sentencing Guidelines, *Burns* actually addressed the larger question of whether any sua sponte departure—upward or downward—requires notice to the United States attorney and the defendant.<sup>3</sup> The Court's decision that a federal judge must give notice before departing from the sentencing range will prevent the unexpectedly lenient sentencing of a defendant for a felony conviction. Any judge that wants to impose a lighter sanction than that required by the Guidelines now must notify the SAUSA of his or her intent to do so. Second, *Burns* resolved a split in the circuit courts of appeal. The Court of Appeals for the District of Columbia Circuit had rejected *Burns'* appellate argument that Federal Rule of Criminal Procedure (FRCP) 32 requires a district court judge to notify the federal prosecutor and the defendant of his or her intent to depart sua sponte from a Guidelines sentencing range.<sup>4</sup> On the other hand, the Second,<sup>5</sup> Fifth,<sup>6</sup> and Ninth Circuits<sup>7</sup> had determined previously that FRCP 32 *does* require this notice. *Burns* eliminated all contention by declaring conclusively that a district court judge must notify both sides if he or she wishes to depart in any way

from the applicable Sentencing Guidelines range on his or her own initiative.

The Federal Sentencing Guidelines requires a district court judge to consider "various offense-related and offender-related factors" when he or she calculates a defendant's sentence.<sup>8</sup> A judge may "disregard the mechanical dictates of the Guidelines"<sup>9</sup> only if he or she determines "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."<sup>10</sup>

Almost all the sentences that federal judges impose on criminal defendants fall within the applicable Guidelines range. "Heavier" or "lighter" sentences may occur, however, when a district court departs from the sentencing range and imposes a sentence either "above" or "below" the Guidelines range. Ordinarily, a defendant knows in advance that an upward or downward departure is likely because the United States Probation Office has recommended the departure in its presentence report or the Government has notified the district court that it will move for a departure.<sup>11</sup> Accordingly, both sides normally are prepared to respond to a departure proposal.

In *Burns*, however, the district court acted "on its own initiative and contrary to the expectations of both" sides when it decided to depart from the sentencing range.<sup>12</sup> Neither party had notice of the court's intent. Was this lack of notice permissible? No, the Court responded. Federal Rule of Criminal Procedure 32 expressly requires a district court judge to give the federal prosecutor and the defendant "An opportunity to comment upon ... matters relating to an appropriate sentence" at the sentencing hearing.<sup>13</sup> If a party is given "the right to comment"<sup>14</sup>

<sup>1</sup>111 S. Ct. 2182 (1991).

<sup>2</sup>*Id.* at 2183.

<sup>3</sup>"It is equally appropriate to frame the issue as whether the parties are entitled to notice before the district court departs upward or downward from the Guidelines range. Under Rule 32, it is clear that the defendant and the Government enjoy equal procedural entitlements." *Id.* at 2185 n.4.

<sup>4</sup>*United States v. Burns*, 893 F.2d 1343, 1348 (D.C. Cir. 1990), *rev'd*, 111 S. Ct. 2182 (1991).

<sup>5</sup>*United States v. Palta*, 880 F.2d 636 (2d Cir. 1989).

<sup>6</sup>*United States v. Otero*, 868 F.2d 1412 (5th Cir. 1989).

<sup>7</sup>*United States v. Nuno-Para*, 877 F.2d 1409 (9th Cir. 1989).

<sup>8</sup>*Burns*, 111 S. Ct. at 2184.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 2185.

<sup>11</sup>See Fed. R. Crim. P. 49(a) (defendant must be served with any written sentencing recommendations made by the United States attorney).

<sup>12</sup>*Burns*, 111 S. Ct. at 2186.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

on sentencing matters, he or she also must be given "the right to be notified" of all sentencing matters.<sup>15</sup> To endow a party with the former right while denying him or her the latter simply "makes no sense."<sup>16</sup> The Court concluded that FRCP 32 and congressional intent in initiating the Guidelines must be interpreted as "promoting the focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences."<sup>17</sup> Adequate notice and an opportunity for each side to be heard are vital to this adversarial process.

After *Burns*, SAUSAs practicing in United States district courts are entitled to reasonable notice that a judge intends to depart from the Guidelines. This procedural requirement will not prevent upward or downward departures entirely, but it will protect the Government from surprise departures at sentencing hearings. Major Borch.

### Posttrial Agreements Inevitably Lead to Disagreements

After a general court-martial in which the accused is found guilty, or a special court-martial in which a bad-conduct discharge is adjudged, the staff judge advocate (SJA) must provide a posttrial recommendation to the convening authority before the convening authority may

take action.<sup>18</sup> Rule for Courts-Martial (R.C.M.) 1106(d)(3) prescribes the information that an SJA must include in his or her recommendation,<sup>19</sup> while R.C.M. 1106(d)(5) authorizes the SJA to include "optional matters" in the posttrial recommendation.

An SJA may include in his or her posttrial recommendation "any additional matters deemed appropriate,"<sup>20</sup> including adverse matter from outside the record. If the SJA places adverse matter from outside the record in the recommendation or the addendum,<sup>21</sup> however, he or she must provide the accused with notice and an opportunity to respond.<sup>22</sup> An interesting twist to these requirements appeared in *United States v. Cassell*.<sup>23</sup>

Airman First Class Eric R. Cassell pleaded guilty at a general court-martial to wrongful use of cocaine, larceny, and receiving stolen property.<sup>24</sup> The military judge sentenced the accused to a bad-conduct discharge, confinement for fifteen months, total forfeitures, and reduction to basic airman (E-1).<sup>25</sup> After trial, however, the chief of military justice and the trial defense counsel reached a "posttrial agreement."<sup>26</sup>

The chief of military justice notified the trial defense counsel that the legal office would recommend a two-

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 2187.

<sup>18</sup> Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1106(a) [hereinafter R.C.M.].

<sup>19</sup> R.C.M. 1106(d)(3) provides:

(3) *Required contents.* Except as provided in subsection (e) of this rule [which indicates when no recommendation is required], the recommendation of the staff judge advocate or legal officer shall include concise information as to:

(A) The findings and sentence adjudged by the court-martial;

(B) A summary of the accused's service record, to include length and character of service, awards and decorations received, and any records of nonjudicial punishment and previous convictions;

(C) A statement of the nature and duration of any pretrial restraint;

(D) If there is a pretrial agreement, a statement of any action the convening authority is obligated to take under the agreement or a statement of the reasons why the convening authority is not obligated to take specific action under the agreement; and

(E) A specific recommendation as to the action to be taken by the convening authority on the sentence.

<sup>20</sup> R.C.M. 1106(d)(5).

<sup>21</sup> R.C.M. 1106(f)(7).

<sup>22</sup> R.C.M. 1107(b)(3)(B)(iii); see also *United States v. Groves*, 30 M.J. 811 (A.C.M.R. 1990). In *Groves* the military judge recommended suspension of the adjudged bad-conduct discharge. *Groves*, 30 M.J. at 812. In the posttrial recommendation, the staff judge advocate identified the accused's "probable involvement in other misconduct" as a basis for rejecting the suggested suspension of the bad-conduct discharge. *Id.* The Army Court of Military Review held that a staff judge advocate may include in the posttrial recommendation matters from outside the record as long as the accused is given an opportunity to respond and no evidence suggests that the staff judge advocate is acting in bad faith or that he or she intends to mislead the convening authority. *Id.* at 812-13.

<sup>23</sup> 33 M.J. 448 (C.M.A. 1991).

<sup>24</sup> See Uniform Code of Military Justice arts. 112a, 121, 134, 10 U.S.C. §§ 912a, 921, 934 (1988).

<sup>25</sup> *Cassell*, 33 M.J. at 448.

<sup>26</sup> *Id.* at 449. After this point, the court apparently relied solely on the facts as provided by the affidavit of accused's trial defense counsel. See, e.g., *id.* at 450 ("too much occurred 'off-the-record'; too many matters concerning the appellant appear to have had an impact on the record, yet were not made a part of it").

In *United States v. Choy*, 33 M.J. 1080 (A.C.M.R. 1992), the Army Court of Military Review expressed its reluctance to "use ... 'eleventh-hour affidavits' provided by the Government to 'save a sinking record.'" *Id.* at 1083 n.2 (quoting *United States v. Perkinson*, 16 M.J. 400, 402 (C.M.A. 1983)). In *Cassell*, the Court of Military Appeals appeared to have gone one step further, embracing the trial defense counsel's affidavit without ever mentioning facts presented by the Government. The court apparently found no need to order a hearing in accordance with *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

month reduction in confinement if the accused received a "favorable recommendation" from the local Joint Drug Enforcement Task Force (JDET). As a result, the accused obtained and included with his request for clemency<sup>27</sup> a letter from a JDET Special Agent.<sup>28</sup>

Cassell, however, was in for an unpleasant surprise. Even though he apparently had fulfilled his part of the bargain, the staff judge advocate recommended in the addendum to the posttrial recommendation that the convening authority approve the adjudged sentence.

On appeal, the accused asserted that the staff judge advocate's "change of heart"<sup>29</sup> had occurred when the chief of military justice received information from "someone at JDET" that the accused had not been as helpful and honest as possible.<sup>30</sup> Noting that the staff judge advocate had failed to place this specific information in the addendum, the accused alleged that the staff judge advocate wrongfully had relied upon negative information from outside the record without allowing the accused notice and an opportunity to respond.<sup>31</sup>

Analyzing this issue, the Court of Military Appeals observed that the staff judge advocate did not present to the convening authority any new adverse matters in the addendum, noting specifically that the staff judge advocate did not list the adverse matter as a reason for denying clemency.<sup>32</sup> The staff judge advocate simply wrote in the addendum that the recommendation was based on "[w]eighing the matters presented by the accused at trial and through clemency [sic] against the facts and circumstances of his case."<sup>33</sup>

The court, however, concluded that "too much [had] occurred 'off-the-record.'"<sup>34</sup> First, the chief of military justice and the accused had entered into an off-the-record,

posttrial agreement.<sup>35</sup> Second, the staff judge advocate had relied on off-the-record adverse information in deciding that this agreement had not been satisfied.<sup>36</sup> Third, the accused did not receive any written notice of that information or have any occasion to respond to it.<sup>37</sup> Accordingly, the court found that the accused had not been allowed a "meaningful"<sup>38</sup> opportunity to respond.

*United States v. Cassell* demonstrates that both government and defense counsel should refrain from entering into informal posttrial agreements. *Cassell* exemplifies the difficulties of determining whether the terms of the agreement are satisfied. Moreover, *Cassell* warns that, if an SJA relies on adverse information from outside the record in deciding what recommendation to make, he or she must include that negative information in the recommendation. Only then will the accused have a "meaningful" opportunity to comment.<sup>39</sup> Major Cuculic.

#### ***United States v. Bibo-Rodriguez*—When May Courts Admit Evidence of Subsequent Misconduct in Criminal Proceedings?**

Military Rule of Evidence 404(b) is identical to Federal Rule of Evidence 404(b) and establishes a limited exception to the general inadmissibility of evidence of other crimes or acts. Both rules provide that

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.<sup>40</sup>

No per se approach is intended. Rather, the rules permit an attorney to present evidence if it is offered for a valid

<sup>27</sup>R.C.M. 1105.

<sup>28</sup>The letter stated:

AIRMAN ERIC CASSELL assisted AFOSI SAJDET in an on-going investigation. Cassell provided written statements and personally approached targets of our investigation. Although his actions did not reveal any new information we appreciated his assistance.

*Cassell*, 33 M.J. at 449, n.1.

<sup>29</sup>*Id.* at 449.

<sup>30</sup>Specifically, the accused alleged that "someone at JDET" told the chief of military justice that (1) the appellant "did not fully disclose his knowledge of drug users;" (2) the appellant lied when he claimed that he had used cocaine only once; and (3) the two individuals involved in the theft with the accused stated under oath that *all* the stolen money had been used for food, beer, and video games—not just some of the money as Cassell had claimed. *Id.*

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at 449-50.

<sup>33</sup>*Id.* at 450.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* The court emphasized that the SJA had provided no new, adverse information to the convening authority. *See id.* at 450 & n.2 ("[t]he irony here is that, if the staff judge advocate *had* advised the convening authority of his reasons for not recommending clemency, that information would have been more damaging to [Cassell] than the recommendation he now contests"). The real issue was the staff judge advocate's reliance on new matters from outside the record in deciding if the posttrial agreement was satisfied. *Id.* at 450.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>Fed. R. Evid. 404(b); Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(b).

purpose and the danger of undue prejudice does not outweigh substantially the probative value of the evidence.<sup>41</sup>

A recent decision of the Ninth Circuit Court of Appeals—*United States v. Bibo-Rodriguez*<sup>42</sup>—illustrates the use of this balancing approach to resolve an issue the military appellate courts apparently have not addressed. In *Bibo-Rodriguez*, the Ninth Circuit held that evidence of acts committed subsequent to the charged offense was admissible to show knowledge on the part of the accused, which is one of the purposes specified in Rule 404(b). Although *Bibo-Rodriguez* clearly isolates this issue, the admissibility of this evidence has been addressed in other decisions of the federal courts. Those decisions demonstrate that evidence of acts that occurred after the charged offense is admissible if it is relevant and the proponent of the evidence can satisfy the balancing test of Rule 403.

In *Bibo-Rodriguez*, the accused was convicted of importing 682 grams of cocaine into the United States.<sup>43</sup> The record indicates that Bibo-Rodriguez drove a white Chevrolet pickup truck into the United States on September 26, 1988. The truck was detained, but Bibo-Rodriguez was allowed to return to Mexico. When law enforcement agents searched the truck, they found the cocaine in the truck's roof panel. An arrest warrant then was issued for Bibo-Rodriguez. On December 2, 1988, Bibo-Rodriguez, who had returned to the United States, was arrested for selling thirty pounds of marijuana. He ultimately was released on bail the same day when the outstanding warrant did not show up on a records check. Before his release, however, he told a police officer that he routinely transported marijuana and cocaine from Mexico to the United States and that he had transported the marijuana at issue in the hollowed-out side panels of a Chevrolet Vega hatchback. When Bibo-Rodriguez was arrested a third time, on June 12, 1989, the arrest warrant pertaining to the September 26, 1988, offense was located and he was detained. Bibo-Rodriguez then claimed that he had been paid fifty dollars by a friend to drive the truck into the United States on September 26, 1988, and that he had known nothing about the cocaine in the roof panel of the truck.

At trial, Bibo-Rodriguez entered a conditional guilty plea after the judge overruled his motion to exclude the

December 2, 1988, statements and acts as inadmissible. The conditional plea preserved Bibo-Rodriguez's objection to the extrinsic act evidence.

In upholding admissibility of the evidence, the Ninth Circuit proceeded from the general to the specific. It noted that Rule 404(b) makes no distinction between prior and subsequent acts. The court then pointed out that, if the situation were reversed—that is, if the Government had offered evidence about the September 26, 1988, incident to establish Bibo-Rodriguez's knowledge on December 2, 1988—the extrinsic act evidence would have been admissible. The court explained,

The fact that one knowingly took drugs across the border on an earlier occasion leads to an inference that he or she was not an innocent dupe on a later occasion. There is an identical inference of knowledge when one charged with transportation of a controlled substance is shortly later found to transport knowingly in a similar manner a different controlled substance across the border.<sup>44</sup>

Next, the court reviewed the admissibility of Bibo-Rodriguez's admissions in the December 2, 1988, interview and the underlying December 2, 1988, offense. Holding that the statements were admissible as long as they were relevant, it concluded that their scopes and their proximities in time to the charged offense made them relevant. The court likewise held evidence of the December 2, 1988, acts relevant, even though different drugs had been involved in each incident. The court concluded that the evidence showed that Bibo-Rodriguez was not "duped" and that he knowingly had transported cocaine into the United States on September 26, 1988.<sup>45</sup>

In reaching its decision, the Ninth Circuit "decline[d] to follow three circuit courts which have disallowed subsequent 'other act' evidence to prove knowledge."<sup>46</sup> The decisions to which the court alluded were *United States v. Garcia-Rosa*,<sup>47</sup> *United States v. Jiminez*,<sup>48</sup> and *United States v. Boyd*.<sup>49</sup> Significantly, both *Garcia-Rosa* and *Jiminez* disavowed any intent to establish a blanket rule of exclusion. Moreover, other decisions that the Ninth Circuit declined to cite support admissibility of subsequent act evidence.

<sup>41</sup>See e.g. Fed. R. Evid. 404, notes of the advisory committee on 1972 Proposed Rules. The committee stated, "No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." *Id.*

<sup>42</sup>922 F.2d 1398 (9th Cir.), cert. denied, 111 S. Ct. 2861 (1991).

<sup>43</sup>See 21 U.S.C. §§ 952, 960 (1988).

<sup>44</sup>*Bibo-Rodriguez*, 922 F.2d at 1400.

<sup>45</sup>*Id.* at 1402.

<sup>46</sup>*Id.* at 1400.

<sup>47</sup>876 F.2d 209 (1st Cir. 1989).

<sup>48</sup>613 F.2d 1373 (5th Cir. 1980).

<sup>49</sup>595 F.2d 120 (3d Cir. 1978).

Rather than setting forth a rule of exclusion, two of the three cases the Ninth Circuit distinguished in *Bibo-Rodriguez* actually support admission of subsequent act evidence in appropriate cases. In *Garcia*, the First Circuit Court of Appeals reversed the conviction of Eduardo Rivera Ortiz for conspiracy to possess heroin and cocaine with intent to distribute and for importation of heroin and cocaine, holding that the trial court erroneously admitted evidence of Rivera Ortiz's subsequent unlawful possession of drugs. When law enforcement officers arrested Rivera Ortiz on August 13, 1986, they seized cocaine from his apartment. The Government later offered evidence of this seizure at trial to contradict the defense that Rivera Ortiz had loaned money to his alleged co-conspirators in a legitimate business transaction. The court noted that the evidentiary inference the Government sought to make, "that possession of cocaine at one point in time implies possession of cocaine nineteen months earlier," ran afoul of the basic proscription in Rule 404(b).<sup>50</sup> The court further noted that even if the extrinsic evidence concerned prior acts, the evidentiary chain was too "attenuated" to justify admission of the evidence.<sup>51</sup>

In *Jiminez*, the Fifth Circuit Court of Appeals reversed a conviction for heroin distribution after finding that evidence of subsequent cocaine possession was admitted improperly. Although it declined to bar all use of evidence of subsequent acts, the court concluded that the defendant's cocaine possession, which occurred one year after the charged offense, was too remote. The court also noted that "the extrinsic offense evidence los[t] the race toward admissibility before even reaching the starting mark" because the evidence did not establish that Jiminez actually possessed the cocaine.<sup>52</sup>

In *Boyd*, the Third Circuit Court of Appeals held that admission of evidence of discussions regarding the sale of P-2-P—a key component of methamphetamine—that occurred after the alleged closing date of a conspiracy, was reversible error. In *Boyd*, the trial court admitted the

evidence to permit the Government to show "intent or knowledge or [a] common type of plan or scheme." The appellate court expressly questioned the logic involved in this decision. *Boyd*, however, might be viewed best as a case involving evidence of a conspiracy. If so, it merely demonstrates that evidence of a defendant's acts subsequent to the charged ending date of the conspiracy may be inadmissible.<sup>53</sup>

The broader context likewise supports—but does not guarantee—admissibility of subsequent act evidence. For example, in *Dowling v. United States*,<sup>54</sup> the United States Supreme Court held that the Double Jeopardy Clause did not bar admissibility of evidence of a subsequent act when the defendant had been acquitted of the subsequent act. Although *Dowling* turned on the application of double jeopardy principles, not on Rule 404(b), the Court rejected the contention that the admission of the subsequent act evidence was fundamentally unfair. The conclusion that subsequent act evidence may be admitted in appropriate cases necessarily is subsumed in the broader conclusion that the admission involved no fundamental unfairness.

Other decisions reveal that subsequent act evidence may or may not be admissible to show: (1) predisposition;<sup>55</sup> (2) duress, or the absence of duress;<sup>56</sup> (3) a common plan or scheme;<sup>57</sup> and (4) intent.<sup>58</sup> Admissibility of the evidence will depend on its relevance. Unfortunately, no clear standards can be gleaned from existing caselaw. Temporal proximity is important, but—depending on the facts of the individual cases—acts occurring eight months after the charged misconduct may be too remote, while acts occurring fifteen months later may not.<sup>59</sup> That different drugs are involved in each act generally is not significant.<sup>60</sup>

This chaos suggests that to gain the admission of subsequent act evidence is a demanding test of the advocacy skills of trial and defense counsel. Although the courts

<sup>50</sup> *Garcia*, 876 F.2d at 221.

<sup>51</sup> *Id.*

<sup>52</sup> *Jiminez*, 613 F.2d at 1376.

<sup>53</sup> See *United States v. Buhl*, 712 F. Supp. 53, 56 (E.D. Pa. 1989) (distinguishing *Buhl* from *Boyd* and *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988) by stating that "the extrinsic evidence erroneously admitted in those cases was evidence of other acts to show a conspiracy existed after the charged conspiracy concluded").

<sup>54</sup> 493 U.S. 342 (1990).

<sup>55</sup> Compare *United States v. Moschiano*, 695 F.2d 236 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983) (admissible) and *North Carolina v. Goldman*, 389 S.E.2d 281 (N.C. App. 1991) (admissible) with *United States v. Miller*, 883 F.2d 1540 (11th Cir. 1989) (inadmissible to prove intent). In this regard, the Fifth and Eleventh Circuits view predisposition as a state of mind. See *United States v. Richardson*, 764 F.2d 1514, 1522 n.2 (11th Cir. 1985); *United States v. Webster*, 649 F.2d 346, 350 (5th Cir. 1981) (en banc).

<sup>56</sup> See *United States v. Hearst*, 563 F.2d 1331, 1336-7 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978); *Buhl*, 712 F. Supp. at 56.

<sup>57</sup> See *United States v. Terebecki*, 692 F.2d 1345 (11th Cir. 1982).

<sup>58</sup> Compare *Miller*, 883 F.2d at 1540 (eight months between acts too remote) with *Terebecki*, 692 F.2d at 1345 (fifteen months not too remote).

<sup>59</sup> See *United States v. Mehrmanesh*, 689 F.2d 822 (9th Cir. 1982) (prior and subsequent sales of cocaine speak to defendant's intent to sell heroin).

<sup>60</sup> See *Bibo-Rodriguez*, 922 F.2d at 1400; *Moschiano*, 695 F.2d at 236 (subsequent attempt to purchase commercial quantity of Preludin relevant to heroin offenses). But cf. *United States v. Daniels*, 572 F.2d 535, 538 (5th Cir. 1978) (subsequent possession of sawed-off shotgun not probative of predisposition to sell narcotics).

have warned that subsequent act evidence may be "less probative" than evidence of similar prior acts,<sup>61</sup> the evidence is relevant to the purposes of Rule 404(b). When counsel contemplate using or opposing the use of subsequent act evidence, they should keep in mind the need to identify specific Rule 404(b) purposes for the evidence and to perform the Rule 403 balancing test. Lieutenant Colonel Park, USAR.

### *International Law Note*

#### **Operational Law (OPLAW) Handbook Under Revision**

The *OPLAW Handbook*<sup>62</sup> has become the hornbook for deploying judge advocates. Its success has been noted widely; however, praise for the *Handbook* has been accompanied by pleas from the field that it be cut down to a "deployable" size. These requests, along with the dramatic changes that have occurred in the world since the *Handbook* first was developed in the mid-1980's, mandate that the *Handbook* now be revised.

Accordingly, the International Law Division of The Judge Advocate General's School (TJAGSA) is updating and reformatting the *OPLAW Handbook*. As always, any input from the field will be appreciated greatly. In particular, we ask judge advocates who were involved in Operations Nimrod Dancer, Just Cause, Promote Liberty, Desert Shield, Desert Storm, Provide Comfort, Sharp Edge, and Eastern Exit,<sup>63</sup> as well as peacekeeping missions, humanitarian assistance missions, drug interdiction missions, and other recent military operations, to submit appropriate materials. We thank those of you who already have contributed after-action reports and lessons learned from these operations and ask that you continue to support this project. The point of contact at the International Law Division, Major Mac Warner, may be reached at (804) 972-6374.

The International Law Division intends not only to reduce the size of the *Handbook*, but also to incorporate the new strategies and structures that influence today's military. The "new world order" envisioned by President Bush and the collapse of the Soviet Union have made America's "containment" strategy obsolete. In his National Security Strategy of August 1991, President Bush proclaimed a new plan of "Peacetime Engagement." Peacetime Engagement contemplates the use by the United States of "elements of [its] national power" to prevent wars and regional conflicts, instead of confronting adversaries in combat or in "cold war" sce-

naros. Recognized elements of national power include American military strength, public diplomacy, economic vitality, moral and political examples, and alliances.

Structurally, the shift in strategies has caused a corresponding change in the "military strength" component of America's national power. To accomplish the Peacetime Engagement mission, the 1992 National Military Strategy established a "Base Force" consisting of strategic deterrence, forward presence, crisis response, and force reconstitution. From this structure, the military will perform not only its traditional roles, but also new roles, such as drug interdiction and United Nations and regional peacekeeping missions.

Naturally, military attorneys have their roles in Peacetime Engagement as members of the Army staff, whether they are deployed forward, serve as a part of the contingency forces that comprise the power projection package, or serve with the force reconstitution element. An operational law attorney, however, plays a special role in the Peacetime Engagement mission because he or she is the staff expert on issues such as the legal use of force, rules of engagement, international agreements, and all other associated legal matters.

Proficiency in operational law promotes the military strength of the United States in its capacity as an element of national power. It allows the OPLAW attorney to walk the commander right up to the line between peacetime engagement and low intensity conflict. In this manner, the law becomes an arrow in the commander's quiver and can be used as a force multiplier.

The second edition of the *OPLAW Handbook* will pull all these concepts together to the extent that any "deployable handbook" can. Naturally, to understand fully the momentous changes that confront the Army of the 1990's, OPLAW attorneys must read, study, and discuss these matters. The International Law Division strongly advises OPLAW attorneys to attend an OPLAW Seminar at TJAGSA. The next two seminars are scheduled from 13 to 17 April 1992 and from 31 August to 4 September 1992. Operational law practitioners should note that, like the *OPLAW Handbook*, the OPLAW Seminar has undergone some changes. In particular, a classified (secret) seminar has been introduced, in which OPLAW instructors discuss the Joint Chiefs of Staff Peacetime Rules of Engagement. If you are working in the OPLAW arena, be sure your security clearances are in order; you should hold a top-secret clearance, if possible. Major Warner.

<sup>61</sup> See e.g. *Moschiano*, 695 F.2d at 236; cf. *Boyd*, 595 F.2d at 126 ("the logic of showing prior intent or knowledge by proof of subsequent activity escapes us").

<sup>62</sup> International Law Division, The Judge Advocate General's School, U.S. Army, *Operational Law Handbook* (Feb. 1989).

<sup>63</sup> Operations Sharp Edge and Eastern Exit were Marine Corps noncombatant evacuation order missions.

## Contract Law Note

### Fiscal Law Update: Funding of Reprocurement Contracts Policy Revised

In the December 1991 issue of *The Army Lawyer*,<sup>64</sup> we reported that the Comptroller of the Department of Defense had issued a policy memorandum<sup>65</sup> requiring the use of current fiscal year funds for reprocurement contracts. The Comptroller's policy was then under revision. On January 27, 1992, the Comptroller revised the August 12, 1991, memorandum.<sup>66</sup>

The effect of the January 27, 1992, policy statement is to return the funding of reprocurement contracts to the state of the law before August 12, 1991. Under the revised policy, contracting officers may use prior-year funds when awarding a reprocurement contract if *all* of the following conditions are met: (1) the agency has a continuing bona fide need for the goods or services; (2) the original contract was awarded in good faith; (3) the reprocurement contract is of the same size and scope as the original contract; (4) the replacement contract is

executed without undue delay; and (5) the contract is awarded to a different contractor. The notice provisions of 31 U.S.C. § 1553(c) apply to the reprocurement contract.<sup>67</sup> The only new requirement in the revised policy memorandum concerns the award of the replacement contract to a different contractor.

The revised policy memorandum also covers terminations for convenience when the termination results from a court order, from the decision of the General Accounting Office (GAO) or a board of contract appeals, or from a contracting officer's decision that the original contract was awarded improperly. The provisions that relate to terminations for convenience bring Defense Department policy in line with existing statutes and GAO decisions concerning the funding of the award of a replacement contract after a bid protest.<sup>68</sup> Major Dorsey.

### Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be

<sup>64</sup>Contract Law Note, *Fiscal Law Update: Funding of Reprocurement Contracts*, *The Army Lawyer*, Dec. 1991, at 39.

<sup>65</sup>Memorandum, Deputy Comptroller (Management Systems), Department of Defense, Aug. 12, 1991, subject: Contract Defaults Resulting in Reprocurement Actions, reprinted in *Contract Law Note*, *supra* note 64, at 39 n.25.

<sup>66</sup>Memorandum, Office of the Deputy Comptroller (Management Systems), Department of Defense, 27 Jan. 1992, subject: Contract Defaults Resulting in Reprocurement Contract Actions. The full text of the January 27, 1992, memorandum is set forth below:

#### MEMORANDUM FOR

Assistant Secretary of the Army (Financial Management)  
Assistant Secretary of the Navy (Financial Management)  
Assistant Secretary of the Air Force (Financial Management and Comptroller)  
Directors of the Defense Agencies  
Director, Washington Headquarters Services

SUBJECT: Contract Defaults Resulting in Reprocurement Contract Actions

In an August 12, 1991, memorandum, subject as above, guidance was provided regarding the use of expired appropriations for reprocurement actions after a contract is cancelled. This memorandum revises the previous August 12, 1991, guidance.

When a reprocurement action will result in a replacement contract, it may be funded from expired accounts if all of the following conditions are met:

- The DoD Component has a continuing bona fide need for the goods or services involved.
- The original contract was awarded in good faith.
- The original contract was terminated for default or for the convenience of the Government. If the original contract was terminated for the convenience of the Government, the termination was the result of a:
  - Court Order.
  - Determination by a contracting officer that the contract award was improper when there is explicit evidence that the award was erroneous and when the determination is documented with appropriate findings of fact and of law.
  - Determination by other competent authority (the General Accounting Office or a Board of Contract appeals [sic]), that the contract award was improper.
- The replacement contract is:
  - Substantially of the same size and scope as the original contract.
  - Executed without undue delay after the original contract is terminated.
  - Awarded to a different contractor.

—Actions resulting in obligations which exceed \$4 million and \$25 million are submitted to the DoD Comptroller and the Congress, respectively, for prior approval.

If you have questions on this matter, please contact Ms. Susan M. Williams, of my staff, on (703) 697-3193.

/s/ Sean O'Keefe

<sup>67</sup>Reprocurement obligations that would result in awards greater than \$4 million must be approved in advance by the DOD Comptroller. *Id.* Awards greater than \$25 million require notice to Congress. *Id.*

<sup>68</sup>The provisions of 31 U.S.C. § 1558 govern funding of contracts after protest to the GAO. See 68 Comp. Gen. 158 (1988) (award of replacement contract using prior year funds after court ordered termination); Ms. Comp. Gen., B-238548 (Feb. 5, 1991) (award of contract using prior year funds after contracting officer decision to terminate for convenience because award was improper).

adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

#### **American Bar Association—Legal Assistance for Military Personnel Committee Continuing Legal Education Seminars**

The American Bar Association (ABA) Standing Committee on Legal Assistance for Military Personnel (LAMP) will hold its next quarterly continuing legal education (CLE) seminar and business meeting in Yorktown, Virginia, on 7 and 8 May 1992. The ABA has scheduled subsequent seminars at Fort Leavenworth, Kansas on 18 and 19 June 1992 and at the Naval Justice School at Newport, Rhode Island, on 29 and 30 October 1992.

The CLE program consists of an all-day seminar for Reserve, civilian, and active duty legal assistance attorneys. Civilian practitioners will discuss a variety of topics, including basic and advanced will drafting, estate planning, and selected family law issues. The CLE fee is fifty dollars.

For more information on any ABA-LAMP meeting, contact the ABA-LAMP staff liaison, Gwen Austin, at (312) 988-5760. Major Hancock.

#### **Family Law Note**

##### *Use of Liens to Enforce Child Support Obligations*

A lien is a means of encumbering the transfer of real or personal property. Like a garnishment or a wage assignment, a lien can be an effective tool for securing the payment of child support and arrearages.

Federal law requires all states to enact and maintain "procedures under which liens are imposed against real and personal property for amounts of overdue [child] support."<sup>69</sup> Federal law, however, does not dictate the types of liens that states must permit or the procedures that a support obligee—that is, the custodial parent—must follow to obtain a lien. As a result, state laws differ substantially in their requirements for perfecting liens and in the obligations they actually allow to be secured by liens.

In general, a lien is activated, or "perfected," through the legal act of "recording." Recording is accomplished

by filing certain documents required by local law with the appropriate office. Usually, a lien must be recorded in the county in which the debtor's property is located or registered. Some states, however, have eliminated the need for multiple recordings by creating a central registry for liens.<sup>70</sup>

To increase the utility of liens, some states allow support obligees to perfect liens simply by recording their support orders.<sup>71</sup> In those states, no default in support payments is needed to cloud a noncustodial parent's title in the affected real or personal property. Most states, however, require that an actual default and accrual of arrearages occur before they will permit a custodial parent to perfect a lien against a support obligor through recording.<sup>72</sup>

Laws requiring actual default effectively limit a custodial parent's use of liens to situations in which a support arrearage exists. Moreover, the default requirement often adversely affects a support obligee's "priority date." Liens perfected "first in time" generally take priority over other judgment liens and unsecured creditors. Priority becomes critical when a debtor's equity in the encumbered property is insufficient to satisfy all the liens recorded against it. If the demands of high-priority lienholders exhaust the equity, lien holders of lower priority will receive nothing when the property is sold.

With the advent of automatic wage withholding, a non-custodial parent's failure to pay child support often follows the onset of other financial defaults. These other defaults commonly result in the recording of judgment liens against the noncustodial parent's property. In states in which an arrearage must accrue before a lien may be recorded, a custodial parent probably will lose any "race to the courthouse" to achieve high-priority lienholder status. Moreover, in these states, the custodial parent may have to file multiple recordings to secure arrearages as they accumulate.<sup>73</sup>

A support obligee cannot recover child support simply by recording a lien. A custodial parent often may collect support payments only when the noncustodial parent hopes to sell the encumbered property and needs the lien released, or—if state law permits—when the custodial parent forecloses the lien or resorts to "levy and sale under [a] writ of execution."

Forced sales, however, usually are expensive to conduct. Moreover, they frequently yield sales prices below the value of the debtors' equities in the properties. Further, a support obligee must consider the potential impact

<sup>69</sup> 42 U.S.C. § 666(a)(4) (1988).

<sup>70</sup> See, e.g., Fla. Stat. Ann. § 61.1352 (West 1988).

<sup>71</sup> See, e.g., Cal. Code. § 4383 (West 1991).

<sup>72</sup> See, e.g., Vt. Stat. Ann. tit. 15 § 791 (1991).

<sup>73</sup> See, e.g., Mich. Comp. Laws Ann. § 552.625 (West 1988).

of a forced sale on the noncustodial parent's ability to pay child support. For example, forcing the noncustodial parent to sell his or her automobile may cost that parent his or her job, creating a change of circumstances that might justify a reduction of the support obligation.

A legal assistance attorney advising a support obligor who faces the forced sale of his or her encumbered property to satisfy a lien should become familiar with the appropriate state's debtor protection laws. Many states allow debtors time to redeem foreclosed or levied property or exempt certain types of property entirely from forced sales. In other states, property cannot be sold at a forced public sale at a price substantially below its fair market value.

In general, however, when a custodial parent uses a lien to force the payment of child support arrearages, the optimal solution for the support obligor is to negotiate a release of the lien following satisfaction of accrued arrearages. Consequently, attorneys representing non-custodial parents in support disputes should be familiar with the proper methods of releasing a lien under applicable state law. Major Connor.

### Survivor Benefits

#### *Survivor Benefit Plan—Open Enrollment Period*

Many former service members believe that they are "locked" into the coverage they have chosen under the Survivor Benefit Plan (SBP). Likewise, former service members who decided not to participate in the plan may think they are barred from coverage forever. This is not so.

The provisions of 10 U.S.C. § 1448, as amended by Public Laws 101-189<sup>74</sup> and 102-190,<sup>75</sup> create a one-year, "open enrollment" period, beginning 1 April 1992, during which many former service members may alter their existing SBP or may elect to participate in the SBP program for the first time.

Who may elect into the program? Eligible retirees and former service members who, as of 31 March 1992, are not SBP participants and who either are entitled to retired pay or, as Reservists, could claim retired pay were they

not under sixty years of age may elect to participate in the basic plan. They also may elect to participate in the Supplemental Survivor Benefit Plan, provided that they first request full basic coverage.<sup>76</sup>

Who may change coverage? Individuals who have less than full coverage may increase it. An SBP participant who has covered a dependent child, but not his or her spouse or former spouse, may elect to add coverage for the spouse or former spouse at a base amount not less than the base amount provided for the dependent child.

With certain limitations, any person who, as of 31 March 1992, already has basic SBP for a spouse or former spouse may obtain supplemental coverage, if: (1) the participant's basic coverage is already at the maximum amount; or (2) he or she increases the basic coverage to the maximum amount.<sup>77</sup> Public Law 102-190 amends 10 U.S.C. § 1457 to allow participants four choices for additional coverage. They may increase their monthly spousal annuities by five percent, ten percent, fifteen percent, or twenty percent of the base amounts under their basic SBPs.<sup>78</sup>

Elections made during the open enrollment period must be made in writing, must be signed by the person making the election, and must be received by the appropriate service secretary before the open enrollment period ends.

Each open enrollment plan includes the caveat that the member must live more than two years after the effective date of election. If he or she fails to do so, the election is void and the government will pay the premium deductions in a lump sum to the would-be beneficiary.

The opportunity to elect-in or increase coverage is not without cost. The Secretary of Defense may increase a premium by an amount stated as a percentage of the base amount that reflects the number of years that have elapsed since the person retired. This increase, however, "may not exceed 4.5 percent of that person's base amount."<sup>79</sup>

Regulations are being drafted to implement the new SBP amendments. The Army and Air Force Mutual Aid Association is preparing information papers to explain the changes.<sup>80</sup> The Community and Family Support Cen-

<sup>74</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1405, 103 Stat. 1352, 1586 (1989).

<sup>75</sup>National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. 102-190, § 653, 105 Stat. 1290, 1388 (1991).

<sup>76</sup>Public Law 102-190 amended 10 U.S.C. § 1458(a)(1) to clarify that maximum basic coverage is required to elect supplemental coverage. *See id.* § 653(c), 105 Stat. at 1388.

<sup>77</sup>*Id.* § 653(c)(2), 105 Stat. at 1389.

<sup>78</sup>*Id.* § 653(b)(1), 105 Stat. at 1388 (amending 10 U.S.C. § 1457(b) (1988)).

<sup>79</sup>*Id.* § 653(a), 105 Stat. at 1388 (to be codified at 10 U.S.C. § 1448(j)). The exact cost will not be available until the Defense Department publishes applicable regulations.

<sup>80</sup>For more information, call (800) 336-4538 or write to the following address:

Army and Air Force Mutual Aid Association  
Fort Myer  
Arlington, VA 22211-5002.

ter also will publish information for retirees in an upcoming *Army Echo* newsletter.<sup>81</sup> Major Hostetter,

## Tax Notes

### Corrections to IRS Publications

The Internal Revenue Service (IRS) recently announced several noteworthy corrections to some IRS publications that legal assistance attorneys frequently use.

#### Single Taxpayers and the Earned Income Credit

For 1991 returns, a taxpayer who files as single may qualify for the earned income credit (EIC) if he or she has a qualifying child and meets the other EIC requirements.<sup>82</sup> Two IRS publications<sup>83</sup> incorrectly stated that taxpayers who file as single cannot qualify for the EIC. According to the IRS,<sup>84</sup> practitioners should delete the following statement from Publication 17, *Your Federal Income Tax*, at page 16, and from Publication 501, *Exemptions, Standard Deductions, and Filing Information*, at page 4: "If you file as single, you do not qualify for the earned income credit."

#### Miscellaneous Deductions and the Home Office

The IRS also announced that the discussion in Publication 17 on the limit on the deduction for the business use of a taxpayer's home<sup>85</sup> should read as follows:

*Limit on the deduction.* The deduction for the business use of your home is limited to the gross income from that business use minus the sum of:

1) The business percentage of the otherwise deductible mortgage interest, real estate taxes, and casualty and theft losses, and

2) The expenses for your business that are not attributable to the use of your home (for example, salaries or supplies).<sup>86</sup>

The IRS also advised legal assistance attorneys and tax advisors to make the same change to Publication 529, *Miscellaneous Deductions*.<sup>87</sup> Major Hancock.

### New IRS Publications

The IRS has announced the availability of two new IRS publications.<sup>88</sup> It recently released Publication 946, *How to Begin Depreciating Your Property*, and Publication 947, *Practice Before the IRS and Power of Attorney*. \*

Publication 946 is intended primarily for taxpayers figuring a depreciation deduction for the first time. According to the IRS, Publication 946 is

printed in a two-column, large print format and contains a glossary. Its step-by-step approach explains the section 179 deduction, how to depreciate property using the modified accelerated cost recovery system (MACRS), and rules for listed property. Throughout the publication are examples and worksheets designed to help taxpayers understand and determine if property is eligible for the section 179 deduction or depreciation and, if [they are] eligible, to help them figure these deductions.<sup>89</sup>

<sup>81</sup>For more information, call DSN 221-2695 or write to the following address:

Community and Family Support Center  
Attention: CFSC-FSR  
2461 Eisenhower Avenue  
Alexandria, VA 22331-0521.

<sup>82</sup>The EIC is a special credit for lower-income workers with children that actually live with them. This year, the EIC is composed of three different credits: the basic credit, the health insurance credit, and the extra credit for a child born in 1991. To take any of the credits, a taxpayer:

- must have a qualifying child who lived with the taxpayer for more than six months (12 months for a foster child);
- must have earned some income during 1991;
- must have earned income and adjusted gross income less than \$21,250;
- must file a tax return covering a 12-month period (unless a short period return is filed because of an individual's death);
- must not file as a married taxpayer filing separately;
- may not be a qualifying child of another person;
- must have a qualifying child, who cannot be claimed as the qualifying child of a third person whose adjusted gross income exceeds the taxpayer's; and
- must not have excluded from his or her gross income any income that he or she earned in foreign countries, or have deducted or excluded a foreign housing amount.

See generally Internal Revenue Serv., Pub. 596, *Earned Income Credit* (1991).

<sup>83</sup>Internal Revenue Serv., Pub. 501, *Exemptions, Standard Deduction, and Filing Information* (1991); Internal Revenue Serv., Pub. 17, *Your Federal Income Tax* (1991) [hereinafter IRS Pub. 17].

<sup>84</sup>IRS Announcement 91-185, 1991-52 I.R.B. 28.

<sup>85</sup>See IRS Pub. 17, *supra* note 83, at 172, col. 3. Legal assistance attorneys may want to refer taxpayers to Publication 587, *Business Use of Your Home*, for more information on home office deductions.

<sup>86</sup>IRS Announcement 92-3, 1992-2 I.R.B. 23.

<sup>87</sup>*Id.* (amending Internal Revenue Serv., Pub. 529, *Miscellaneous Deductions*, at 2, col. 3 (1991)).

<sup>88</sup>IRS Announcement 91-186, 1991-52 I.R.B. 28; IRS Announcement 92-2, 1992-2 I.R.B. 23.

<sup>89</sup>IRS Announcement 91-186, 1991-52 I.R.B. 28.

Although Publication 946 duplicates some information contained in Publication 534, *Depreciation*,<sup>90</sup> the IRS will continue to distribute Publication 534 to taxpayers who need information about other depreciation methods, such as the accelerated cost recovery system (ACRS).

New Publication 947 is a "plain-language publication" designed to assist both tax practitioners and taxpayers who want to appoint representatives. It contains detailed information on rules governing practice before the IRS and authorization of representatives. It also discusses the uses of Form 2848, *Power of Attorney and Declaration of Representative*, and new Form 8821, *Tax Information Authorization*.<sup>91</sup>

Taxpayers desiring copies of these publications or of any other IRS publication or form may contact the IRS Forms Distribution Center for their areas, as listed in their federal income tax instruction packages, or they may call the IRS toll-free at 1-800-829-3676. Major Hancock.

#### *Deductibility of Home Mortgage "Points"*

The IRS recently announced that a taxpayer who bought or will buy a home after 1990 may deduct the points he or she paid or will pay when purchasing his or her primary home.<sup>92</sup> A qualifying taxpayer who itemizes deductions may deduct on his or her tax return for the year he or she purchased the home all the "points"<sup>93</sup> that he or she has paid, provided the taxpayer satisfies this five-part test:<sup>94</sup>

- The settlement statement (Form HUD-1) identifies the points—for example, the loan origination fee or the loan discount.
- The points are determined as a percentage of the borrowed amount.
- The points the taxpayer paid were charged pursuant to an established local business practice of charging points for the acquisition of a personal

residence and the amount paid does not exceed the amount generally charged for that area.<sup>95</sup>

- The taxpayer has paid the points in connection with the acquisition of the taxpayer's principal residence and this residence is the security for the loan.
- The taxpayer paid the points directly.

This last requirement is satisfied if, at settlement, the taxpayer paid "from funds that have not been borrowed for this purpose as part of the overall transaction ... an amount at least equal to the amount required to be applied as points at the closing."<sup>96</sup> The IRS will consider a taxpayer's downpayment, escrow deposits, earnest money and other funds that the taxpayer actually paid over at closing in determining whether the taxpayer actually paid an amount at least equal to the amount of points charged. If the taxpayer simply financed the "points" by increasing the loan amount without paying an amount at least equal to the amount of the points, the taxpayer does not satisfy this part of the test.

The new rules on points deductibility apply only to a loan for the acquisition of a principal residence. They do not apply to improvement loans; nor do they apply to points paid on loans for the purchase or improvement of a residence that is not the taxpayer's principal residence—that is, for example, a second home, vacation property, or investment property. Finally, the rules do not apply to points paid on refinancing a principal residence.<sup>97</sup>

The following example illustrates the new rule. Suppose that, in 1991, Sergeant Taxpayer bought a \$100,000 home with \$5000 in cash she withdrew from her savings account and a \$95,000, thirty-year loan. The mortgage lender charged two points and Sergeant Taxpayer increased the loan amount to \$96,900—adding \$1900 to cover the two points. Before the IRS changed Revenue Procedure 92-12, Sergeant Taxpayer could not have deducted the \$1900 in points. Now, however, she may deduct the full \$1900 on her 1991 tax return<sup>98</sup>—even

<sup>90</sup>Internal Revenue Serv., Pub. 534, *Depreciation* (1991).

<sup>91</sup>Form 8821 is the taxpayer's authorization for the taxpayer's designee to inspect and receive confidential information from the IRS.

<sup>92</sup>Rev. Proc. 92-12, 1992-3 I.R.B. 27.

<sup>93</sup>Mortgage lenders routinely charge points, or up-front interest, on mortgage loans. One point is one percent of the borrowed amount. For example on a \$100,000 loan, one point would be \$1000. Borrowers usually pay this interest charge—also called a loan origination fee—at closing.

<sup>94</sup>See Rev. Proc. 92-12, 1992-3 I.R.B. 27 (announcing IRS's adoption of the five-part test).

<sup>95</sup>Rev. Proc. 92-12 provides that "if amounts designated as points are paid in lieu of amounts that are originally stated separately on the settlement statement (such as appraisal fees, inspection fees, title fees, attorney fees, property taxes, and mortgage insurance premiums) those amounts are not deductible as points under this revenue procedure." *Id.*

<sup>96</sup>*Id.*

<sup>97</sup>*Id.* Points paid on loans obtained to refinance an existing mortgage are deductible in full in the year they are paid, but only if they are paid in connection with a loan for the improvement of a home. Points paid to obtain lower monthly payments may be deducted only over the life of the loan.

<sup>98</sup>Sergeant Taxpayer may deduct the points if she can claim enough other deductions to itemize using Form 1040, *Schedule A, Itemized Deductions*. Otherwise, she may be able to use the points purchase expenses to increase her moving expenses.

though she did not pay the points out of her separate funds at closing—because she did pay \$5000 out of her savings account. Major Hancock.

### ***Administrative and Civil Law Note***

#### **Digest of Opinion of The Judge Advocate General**

##### ***Official Use of Government Motor Vehicles***

Army Regulation 58-1 implements Army policy on the use of administrative-use motor vehicles.<sup>99</sup> Paragraphs 2-5 and 2-6 of the regulation outline authorized and unauthorized uses. Government motor vehicles generally may be used only for official purposes. Some guidance in the regulation, however, is subject to local interpretation. A Training and Doctrine Command (TRADOC) installation recently asked The Judge Advocate General to interpret paragraph 2-5c of AR 58-1.

Paragraph 2-5c states that "motor vehicle support may be provided for authorized activities when commanders decide that failure to do so would have an adverse effect on morale of service members." The regulation provides examples of authorized activities, including morale, welfare, and recreation (MWR) events, and points out that vehicle use may not interfere with mission needs or generate requirements for additional vehicles.

The TRADOC installation interpreted this provision as follows: (1) the language creates an exception to the "official purpose" restriction; and (2) the exception applies only to recognized MWR activities conducted on the installation. The Judge Advocate General, however,

stated that—with only two statutory exceptions—Army administrative motor vehicles may be used only for "official purposes."<sup>100</sup> The language in paragraph 2-5c, AR 58-1, does not create an exception; it merely exemplifies morale-enhancing activities that may be considered uses for "official purposes."<sup>101</sup> Moreover, the examples in the regulation are not exclusive. The regulation affords a commander the discretion to determine when a particular use of a vehicle supports an "official purpose."<sup>102</sup> In making this determination, the commander must consider all pertinent factors, including whether the use is essential to the activity and consistent with the purpose for which the vehicle was acquired.<sup>103</sup>

The Judge Advocate General also stated that the use of administrative motor vehicles for activities that enhance morale is only one example of an "official use."<sup>104</sup> A commander may authorize use of government vehicles for any lawful administrative function, activity, or operation, on or off post, as long as the use furthers a valid unit mission.<sup>105</sup>

To prevent misuse, or the appearance of misuse, of government vehicles, commanders should scrutinize every request for the use of an administrative vehicle.<sup>106</sup> The commander should ensure that the activity is authorized, that a valid and articulable rationale supports the use of the vehicle, and that the proposed use has "a direct nexus to mission achievement."<sup>107</sup> Finally, the proposed use must not be otherwise prohibited by law, regulation, or higher authority.<sup>108</sup> Commanders should consult with their legal advisors when making decisions on the authorized uses of administrative motor vehicles.<sup>109</sup> Major McCallum.

<sup>99</sup> See generally Army Reg. 58-1, Motor Transportation: Management, Acquisition, and Use of Administrative Use Motor Vehicles (15 Dec. 1979) [hereinafter AR 58-1].

<sup>100</sup> DAJA-AL 1991/2978 at 1 (23 Dec. 1991).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (citing AR 58-1, para. 1-3b(5)).

<sup>104</sup> *Id.* at 2.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 2.

## **Claims Report**

### ***United States Army Claims Service***

#### **Analysis of the Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules\***

##### ***Introduction***

After two years of negotiation, the Army, Navy, and Air Force Claims Services agreed to sign a new Joint

Military-Industry Memorandum of Understanding (MOU) on Loss and Damage Rules with the carrier industry. This new MOU applies to shipments *picked up* after 1 January 1992. It is intended to clarify ambiguities in the 20 April 1984 MOU (reprinted in appendix E, section II, Dep't of Army, Pam. 27-162, Claims (15 Dec. 1989) (hereinafter

\*The United States Army Claims Service previously distributed the following note as a bulletin to claims offices throughout the Army. To minimize confusion in the field, this note has been reprinted in *The Army Lawyer* without modification to the text.

DA Pam 27-162)) and to partially address some carrier concerns.

The carrier industry has been pushing for changes to the 20 April 1984 MOU since 1988, and the industry has enlisted congressional support at several stages of the negotiating process. The new MOU represents a tolerable compromise between the position of the military services and that of the carrier industry. It does, however, involve changes in claims office procedures, particularly with regard to carrier repair estimates. The following paragraph by paragraph analysis is intended to highlight and explain changes from the previous MOU.

#### *Paragraph I. Notice of Loss and Damage*

Paragraph I.(A) of the new MOU replaces paragraph A.(1) from the 20 April 1984 MOU. To clarify matters for the carriers, the new paragraph now explicitly recognizes that inspection at delivery is the joint responsibility of the carrier and the service member, and that the military services will dispatch the DD Form 1840R (Notice of Loss) to the address the carrier lists in block 9 of the DD Form 1840 (Joint Statement of Loss or Damage at Delivery). Claims offices should emphasize to carriers that if the carrier allows its agent to list an address other than the carrier's home office in block 9, the DD Form 1840R will go to the address listed.

To quell fears on the part of some carriers, a footnote to the new paragraph I.(A) addresses how the military services view use of the origin inventory. The information on the inventory is valid evidence that the claims office should consider in determining whether to pay or to assert recovery on a claim. The inventory is not conclusive, however, and claims personnel should also consider evidence showing that an inventory is not accurate. If, for example, the carrier delivered a damaged sofa, the carrier would not be relieved of liability simply because the sofa was not listed on the inventory.

Paragraph I.(B) of the new MOU replaces paragraph B from the 20 April 1984 MOU. Both the old paragraph and the new paragraph permit claims offices to dispatch the DD Form 1840R to the carrier after the normal 75-day notice period in instances where good cause for the delay is shown, as when the claimant was hospitalized or on an officially recognized absence (for example, extended temporary duty). When the claims office extends the notice period past the normal 75 days for an officially recognized absence, the new paragraph now requires claims offices to provide the carrier with proof of the absence.

The "proof" that the claims office must provide will vary, depending on circumstances. The claims office might provide a copy of the claimant's TDY travel orders, or it might provide a statement by the claimant's first sergeant that the claimant's unit was deployed to Saudi Arabia for three months.

Paragraph I.(C) replaces paragraph A.(2) of the 20 April 1984 MOU. There is no change in substance.

#### *Paragraph II. Inspection by the Carrier*

Paragraphs II.(A) and (B) replace paragraphs C.(1) and (2) from the 20 April 1984 MOU. Paragraph II.(A) restates that the carrier has a right to inspect damaged items. It shortens the carrier's inspection period from 75 days after delivery or 45 days after dispatch of the last 1840R (whichever is longer), to 45 days after delivery or 45 days after dispatch of the last 1840R (whichever is longer). Because the inspection period only would be reduced if the claims office dispatches the DD Form 1840R within 30 days of delivery or does not dispatch a DD Form 1840R at all, this change is not significant. Moreover, on code 1 and 2 shipments, even after expiration of the inspection period, the claimant still would have to retain damaged items for possible salvage by the carrier.

Paragraph II.(B) states that if the service member refuses to allow the carrier to inspect *and* the carrier contacts the claims office for assistance, the claims office will contact the service member to facilitate inspection and grant the carrier additional days to inspect. If contacted, claims offices should instruct recalcitrant claimants to allow the carrier to inspect and should deduct lost potential carrier recovery in accordance with DA Pam 27-162, paragraph 2-55a(6) if a claimant continues to refuse inspection.

When the claimant refuses to allow the carrier to inspect and the carrier contacts the claims office, the MOU specifies that the claims office will provide the carrier with an equal number of additional days to inspect. Because there is no set formula for precisely measuring how many days an "equal" number is, claims offices should strive to grant the carrier a reasonable number of additional inspection days based on the particular facts and circumstances.

Occasionally, an exasperated claimant will refuse to allow inspection after the carrier has missed an inspection appointment or has otherwise abused the inspection process. Claims offices should try to resolve these situations fairly, and should contact USARCS for guidance or assistance if necessary.

A few carriers have sent out form letters to claims offices requesting the claims office to contact claimants initially and set up inspections for them. The MOU only obligates claims offices to facilitate inspections after the claimant has refused to allow the carrier to come. Claims offices should advise such carriers that the MOU does not obligate the claims office to contact claimants initially, because that is the carrier's responsibility, and that the claims office will only intervene in the carrier inspection process after a carrier has made a serious effort to initiate an inspection and been rebuffed by the claimant.

This same reasoning would apply in interpreting the Joint Military-Industry Memorandum of Understanding on Salvage (reprinted in appendix E, section I, DA Pam 27-162). A carrier who merely sends out a letter requesting salvageable property, but makes no effort to pick up items or ascertain whether the items are available for pickup prior to contacting the claims office, is not entitled to any salvage credit and should be so advised.

### *Paragraph III. Repair Estimates Submitted by the Carrier*

Paragraph III is completely new. This paragraph modifies the instructions originally published in *The Army Lawyer* for using carrier estimates (see Personnel Claims Note, *Repair Estimates Provided by Carriers*, The Army Lawyer, Oct. 1987 at 60). If an *itemized* carrier's estimate from a *responsible* firm is the lowest estimate overall, a claims office will use it in the three instances outlined in paragraph III.(B):

(1) A claims office will use an otherwise acceptable carrier estimate received *prior* to the adjudication of the claim in the adjudication process. This reflects current Army practice.

(2) Even if a claimant has already been paid on a claim, a claims office will use an otherwise acceptable carrier estimate *received* within 45 days after *delivery* in the recovery process. This does not imply that a claims office will hold up adjudicating a claim received within 45 days after delivery, nor would a claim office recoup the difference between the carrier's estimate and the claimant's estimate from the claimant unless, of course, the claimant committed fraud. While this will cost the Army carrier recovery in some instances, very few claimants file and are paid within 45 days of delivery. Moreover, to provide estimates prior to the 45th day after delivery, carriers will have to record damage at delivery and inspect property promptly.

(3) If a claims office does not receive a carrier's estimate before the claim is adjudicated or within 45 days after delivery, the office will only use a carrier's estimate if the carrier establishes that the claimant's estimate was unreasonable. This reflects the standard set by the Comptroller General.

Except as provided in (1) and (3) above, USARCS strongly cautions claims offices *not* to accept a carrier's argument that the office should use a carrier estimate received "within 45 days after dispatch of the DD Form 1840R." Elements within the carrier industry desired this very strongly; the military services did not agree, and this is *not* what the MOU states.

Paragraph III.(A) requires claims offices to evaluate itemized carrier estimates from responsible firms in the same manner as any other estimate. When a claims office rejects a carrier estimate received in a timely manner (prior to adjudication of the claim, or within 45 days of *delivery*), the office must annotate the file with the rea-

sons for doing so and must inform the carrier. Claims offices may list their reasons either by annotating the DD Form 1843 (Demand on Carrier/Contractor) or by including a separate memorandum for record in the demand packet.

A claims office should reject a carrier's estimate received in a timely manner for many of the same reasons that the office would reject a claimant's estimate. A claims office should not use a carrier's estimate if the repair firm chosen by the carrier has a reputation for incompetence, does not provide an itemized estimate, lacks the skill to do the specialized repairs required, cannot perform the work in a timely manner, or is known to provide unreliable estimates (that is, the firm will provide an exaggerated estimate or an estimate below normal charges if requested to do so). Moreover, if the carrier provides an estimate from a repair firm that cannot perform the repairs in the claimant's home and is located a considerable distance from the claimant, the claims office should consider excessive drayage costs in determining whether a carrier's estimate should be used in either the adjudication or recovery process.

The situation may arise where a claimant uses a repair firm selected by the carrier and is dissatisfied with the result. Claims personnel should investigate and determine whether there is an objective basis for this, distinguishing between competent, workmanlike repairs and the "perfect" repairs that an unreasonable claimant may demand. If the repairs are not adequate, the claims judge advocate should contact the carrier and the carrier's repair firm and advise them of this. As with inadequate carrier repairs on Full Replacement Protection (Option 2) shipments, if the carrier and the carrier's repair firm are afforded an opportunity to correct the problem and cannot do so, the claims office should take whatever remedial action is appropriate based on the particular facts, which may include payment and assertion of a demand based on a higher repair estimate. Claims offices must document any such incident and should contact USARCS for assistance.

Paragraph III.(B)(4) allows carriers to conduct a second inspection if the carrier receives a DD Form 1840R after conducting an initial inspection based on the DD Form 1840. The carrier should, of course, conduct this second inspection within 45 days of dispatch of the DD Form 1840R in accordance with paragraph II.(A). This provision is intended to encourage early inspection by the carrier and to avoid placing a carrier who inspects and provides the claims office with an estimate at a disadvantage if the claimant comes in on the 70th day after delivery and reports a large amount of additional damage.

The paragraph also authorizes claims offices to credit carriers for up to \$50 of the cost of a second inspection if the claimant reports significant additional damage after the carrier already has inspected once. If the cost of a second inspection is less than \$50, the claims office should only award the actual costs.

Note, however, that a claims office may *only* credit the carrier for the cost of a second inspection if the carrier actually went out and inspected based on the DD Form 1840 prior to receiving a DD Form 1840R. Moreover, this provision does *not* apply every time the carrier goes out to inspect and later receives a DD Form 1840R. If the claimant showed the carrier the damaged items listed on the DD Form 1840R during the first inspection or has thrown the items away, there is no need to authorize payment for a second inspection.

Moreover, the claims office should not authorize payment for a second inspection if the later-discovered damage is not worth inspecting. The test should be whether a reasonable and prudent carrier would inspect. Obviously, a reasonable and prudent carrier would not inspect if the costs of inspection exceeded the potential carrier liability. Serious damage to a schrank would warrant a second inspection; three broken dishes would not.

To avoid difficulties over second inspections, claims offices should strongly encourage carriers making early inspections to ask the claimant to bring out any damaged items not listed on the DD Form 1840 at delivery. Claims offices should also strongly encourage carriers to call the office and find out whether the office will authorize payment for performing a second inspection *prior* to performing that inspection.

Paragraph III.(B)(5) specifies that the carrier must provide service members with copies of the repair estimate within a reasonable period of time, if requested. Occasionally, carrier repair firms will refuse to give claimants a copy of the estimate or will attempt to charge the claimant an estimate fee to provide a copy. This paragraph requires the carriers to provide a copy of the estimate to the service member, although the carriers insisted on having the home office receive a copy first. The intent behind this is to ensure that a claimant actually can have repairs performed by the repair firm providing the lowest estimate.

The last sentence in paragraph III.(B)(5) reflects the policy that claims offices will not accept repair "estimates" from firms that do not do repair work. Claims offices should not use appraisals disguised as "estimates" from carriers or claimants.

Paragraph III.(C) replaces paragraph D from the 20 April 1984 MOU. While the language is substantially changed, there is little change in substance. The new paragraph does state that claims offices will provide the carrier with a copy of the claimant's estimate used as part of the demand, which claims offices are already required to do.

#### *Paragraph IV. Carrier Settlement of Claims by the Government*

Paragraph IV.(A) replaces paragraph E from the 20 April 1984 MOU. It includes significant changes. The

first sentence specifies that a carrier must pay (that is, send a check), deny, or make a firm settlement offer within 120 days of receipt of a claim. This is intended to address the practices of some carriers who send "responses" asking for more documents around the 119th day after receiving a demand.

After receiving demands at their home offices, a few carriers apparently delay sending the demands to agents authorized to settle them and then demand additional time. Certainly, a demand delivered to a carrier's home office has been "received." As a rule of thumb, a claims office may assume that a carrier "receives" a demand within ten days after it was dispatched.

The second sentence in the new paragraph states that if a carrier makes an offer within 90 days of receipt of a demand, the military services will not offset the claim without providing the carrier with a written response to that offer. While, in theory, claims activities respond in writing to every settlement offer prior to offset, the military services declined to assure the carrier industry that they would do so in every instance where the carrier responds after the 90th day after receipt.

Paragraph IV.(B) replaces para F from the previous MOU without any significant change in substance.

#### *Paragraph V. Effective Date*

The MOU applies to shipments *picked up* after 1 January 1992. The 20 April 1984 MOU continues to apply to shipments picked up before that date.

#### *Conclusion*

The new MOU is in best interests of the military services. It will not greatly burden either service members or field offices, nor will it significantly reduce carrier recovery. Overall, it is a fair agreement which will deflect attempts by carriers to persuade Congress to legislate changes to the claims process. Mr. Frezza.

#### *Military-Industry Memorandum of Understanding on Loss and Damage Rules*

To establish the fact that loss or new transit damage to household goods owned by members of the military was present when the household goods were delivered at destination by the carrier.

##### *I. Notice of Loss and Damage.*

(A) Upon delivery of the household goods, it is the responsibility of the carrier to provide the member with three copies of the DD Form 1840/1840R and to obtain a receipt therefor in the space provided on the DD Form 1840. It is the joint responsibility of the carrier and the member to record all loss and transit damage on the DD Form 1840 at delivery. Later discovered loss or transit damage, including that involving packed items for which unpacking has been waived in writing on the DD Form

1840, shall be listed on the DD Form 1840R. The carrier shall accept written documentation on the DD Form 1840R, dispatched within 75 calendar days of delivery to the address listed in block 9 on the DD Form 1840, as overcoming the presumption of correctness of the delivery receipt. (1)

(B) Loss of or damage to household goods discovered and reported by the member to the claims office more than 75 calendar days after delivery will be presumed not to have occurred while the goods were in the possession of the carrier unless good cause for the delay is shown, such as officially recognized absence or hospitalization of the service member during all or a portion of the period of 75 calendar days from the date of delivery. In case of recognized official absences, the appropriate claims office will provide the carrier with proof of the officially recognized absence with the demand on carrier.

(C) The carrier's failure to provide the DD Form 1840/1840R to the military member and to have proof thereof will eliminate any requirement for notification to the carrier. Written notice, using DD Forms 1840/1840R, is not required by the carrier in the case of major incidents described by Paragraph 32 of the Tender of Service which requires the carrier to notify Headquarters, Military Traffic Management Command and appropriate PPSO's of the details of fires, pilferage, vandalism, and similar incidents which produce significant loss, damage or delay.

## *II. Inspection by the Carrier*

(A) The carrier shall have 45 calendar days from delivery of shipment or dispatch of each DD Form 1840R, whichever is later, to inspect the shipment for loss and/or transit damage.

(B) If the member refuses to permit the carrier to inspect, the carrier must contact the appropriate claims office which shall facilitate an inspection of the goods. It is agreed that if the member causes a delay by refusing inspection, the carrier shall be provided with an equal number of days to perform the inspection/estimate (45 days plus delay days caused by member).

## *III. Repair Estimate Submitted by the Carrier*

(A) Subject to the procedures in this Memorandum of Understanding, the military services shall evaluate itemized repair estimates submitted by a carrier from a qualified and responsible firm in the same manner as any estimate submitted by a claimant from a repair firm not associated with or retained by the carrier.

### *(B) Carrier estimates:*

(1) If the appropriate claims office receives an itemized repair estimate from the carrier within 45 calendar days of delivery, the claims office will use that estimate if it is the lowest overall, and the repair firm selected by the carrier can and will perform the repairs

adequately for the price stated, based upon the repair firm's reputation for timely and satisfactory performance. If the carrier's estimate is the lowest overall estimate and is not used, the claims office will advise the carrier in writing of the reason the lowest overall estimate was not used in determining the carrier's liability.

(2) The claims office will also use an itemized carrier estimate received more than 45 calendar days after delivery if the claim has not already been adjudicated and that estimate is the lowest overall, and the repair firm selected by the carrier can and will perform the repairs adequately for the price stated, based on the firm's reputation for timely and satisfactory performance. If the carrier's estimate is the lowest overall estimate and is not used, the claims office will advise the carrier in writing of the reason the lowest overall estimate was not used in determining the carrier's liability.

(3) If the carrier provides the appropriate claims office with a low repair estimate after the Demand on Carrier has been dispatched to the carrier's home office, it will be considered in the carrier's recovery rebuttal or appeal process if lower than the estimate used by the claims office and if it establishes that the estimate submitted by the member was unreasonable in comparison with the market price in the area or that the price was unreasonable in relation to the value of the goods prior to being damaged.

(4) If a carrier has made an inspection/estimate based upon a DD Form 1840, and a DD Form 1840R is received, the carrier is authorized to make an additional inspection/estimate. The carrier will contact the claims office to determine if they will authorize a deduction of \$50.00 from the carrier's liability for performing the second inspection/estimate.

(5) When a carrier makes an estimate, copies will be provided in a reasonable time to the military claims office and to the member, if requested. The carrier agrees to do the repairs in a reasonable time if requested by the member or the military claims office. Carrier and member estimates provided by firms that do not perform repairs will not be accepted.

(C) No claim shall be denied solely because of the carrier's lack of opportunity to inspect prior to repair, an essential item that is not in operating condition such as a refrigerator, washer, dryer, or television requiring immediate repair. In such cases, the carrier will be provided with copies of the repair estimate/receipt attached to the demand.

## *IV. Carrier Settlement of claims by the Government*

(A) The carrier shall pay, deny, or make a firm settlement offer in writing within 120 calendar days of receipt of a formal claim from the Government. If a carrier makes an offer within 90 calendar days of receipt of a formal claim which is not accepted by the Government, a

written response to the offer will be made prior to offset action.

(B) It is agreed that the claim will be limited to item(s) indicated on the DD Form 1840 and 1840R, except as indicated in paragraphs I (B) and I (C) above. The claims for loss and/or damage shall not be limited to the general description of loss or damage to those items noted on the DD Form 1840 and 1840R.

*V. Effective Date* This Memorandum of Understanding will be effective on January 1, 1992 and will apply to shipments picked up/loaded on or after that date. It supersedes the Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules of April 20, 1984, except that the Memorandum of April 20, 1984, will apply to shipments picked up and loaded prior to January 1, 1992.

*VI. Filing* The original of this Memorandum of Understanding shall be retained by the American Movers Conference, which shall provide conformed copies to all signatories and other interested parties.

For:

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Household Goods Forwarders  
Association of America, Inc.  
Donald H. Mensch  
President

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American Movers Conference  
Joseph M. Harrison  
President

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Household Goods Carrier's Bureau  
Joseph M. Harrison  
President

---

Independent Government Movers  
John T. McBrayer  
Executive Director

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Independent Government Movers  
James P. Coleman  
President

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National Moving and Storage Association  
Gary Frank Petty  
President

#### NOTE:

<sup>1</sup> Although the carrier shall accept written documentation on the DD Form 1840R as overcoming the presumption of correctness of the delivery receipt, the inventory prepared at origin is valid evidence which the military claims services shall consider in determining whether or not a claimant has sustained loss and/or damage in shipment. If for example, a claimant wrote on the DD Form 1840R that a kitchen table not listed on the inventory was missing in shipment, that claimant would have to prove by convincing evidence that he or she owned and tendered to the carrier for shipment a kitchen table. An item like a kitchen table would normally be listed on the inventory. Note, however, that if a kitchen table not listed on the inventory was delivered in a damaged condition and noted on the DD Form 1840/1840R, the fact that the carrier delivered the kitchen table would establish the claimant owned and tendered to the carrier a kitchen table.

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Department of the Army  
Joseph C. Fowler, Jr.  
Colonel, USA  
Commander

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Department of the Navy  
Milton D. Finch  
Captain, USN  
Deputy Assistant JAG (Claims)

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Department of the Air Force  
Robert G. Douglass  
Colonel, U.S. Air Force  
Chief, Claims and Tort Litigation Division  
Air Force Legal Services Agency

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U.S. Coast Guard  
William B. Thomas  
Captain, U.S. Coast Guard  
Chief, Claims and Litigation Div.  
Office of Chief Counsel

## Management Note

The 1992 United States Army Claims Service (USARCS) Claims Training Workshop will be held from 20 to 24 July 1992 at the Guest Quarters Suite Hotel, 1300 Concourse Drive, Baltimore-Washington International Airport, Linthicum, Maryland. The principal objectives of the workshop are to present recent legal developments in the claims field, to present the background and basis for policy developed by USARCS in the administration of the claims program, and to conduct training of general and specific interest to attendees.

The attendees for this workshop will be claims judge advocates and claims attorneys. This will be our one training and continuing legal education forum for claims

attorneys this year. All staff and command judge advocates are encouraged to make the time and funds available so their attorneys can attend; such an investment will pay many dividends in the future.

The United States Army Claims Service truly appreciates the excellent support and superb facilities that The Judge Advocate General's School provided for our past workshops held at the School. The location was changed to one closer to USARCS solely to permit us to use more fully the expertise and talents of our claims personnel in the training. It also will enable claims judge advocates and attorneys to visit USARCS to discuss their cases and the issues affecting them with their area action officers. We are confident that the greater interaction that this will provide between claims personnel will enhance the training our attendees will receive. Colonel Fowler.

## Labor and Employment Law Notes

*OTJAG Labor and Employment Law Office and TJAGSA Administrative and Civil Law Division*

### Disciplining Sexual Harassers

Two recent decisions on sexual harassment, one from the Merit Systems Protection Board (MSPB) and the other from the Equal Employment Opportunity Commission (EEOC), raise disquieting questions about how an agency should respond to a substantiated allegation of sexual harassment.

In *Julian v. Frank*, EEOC No. 01912215 (Equal Employment Opportunity Comm'n 1991), the EEOC decided a case involving the alleged sexual harassment of a postal employee by her immediate supervisor. At the initial hearing the administrative judge (AJ) found that the complainant had been subjected to repeated unwanted solicitations for dates from her immediate supervisor, who also occasionally put his hands around her waist, told her that "she did not know what young [sic] can do for her," and showed her a list of other female employees he had dated, encouraging her to add her name to the list. The Postal Service issued a final agency decision in which it adopted the AJ's recommended finding of discrimination. The Postal Service, however, modified the corrective relief recommended by the AJ. As amended, the complainant's remedy included the following:

(1) the Postal Service would take steps to ensure that the complainant's supervisor would not subject her to harassment or retaliation. It also would review the entire record to determine whether disciplinary action against the offending supervisor was warranted;

(2) the offending supervisor would receive comprehensive training on sexual harassment;

(3) the Postal Service would continue to monitor the activities of the complainant's unit to ensure that no Title VII violations occurred;

(4) the Postal Service would not act on actions addressed in a subsequent equal employment opportunity (EEO) complaint by the complainant until the resolution of that subsequent complaint; and

(5) the Postal Service would offer the complainant a position outside the unit. (The complainant, however, previously had refused reassignment.)

On appeal, the complainant alleged that neither the remedial relief recommended by the AJ, nor the relief ordered by the agency, afforded her the full scope of remedies available to her as a victim of sexual harassment and retaliation. She also asserted that the ordered relief was inadequate to protect her from further harassment.

The EEOC agreed, noting that an agency has an affirmative obligation to take all steps necessary to prevent sexual harassment. The Commission's order included the following remedies:

(1) The EEOC directed the Postal Service to take steps to prevent the complainant and other employees from being subjected to sexual harassment or reprisal in the future.

(2) The EEOC directed the Postal Service to review the matter that gave rise to the complaint to determine whether disciplinary action against the official who harassed the complainant was appropriate, to record the basis of its decision to take this action, and to report its findings and the basis of its decision to the Commission.

(3) The EEOC ordered the Postal Service to act immediately to ensure that the complainant did not remain under the supervision of the offending official. The Postal Service, however, could not require

the complainant to accept a transfer, a reassignment, or a change in shift.

(4) The EEOC ordered the Postal Service to continue to monitor the unit where the complainant was employed for Title VII violations until every vestige of the harassment and hostile work environment and reprisal found in the unit was eliminated.

Two weeks after *Julian* was decided, the MSPB examined sexual harassment from a different perspective. In *Hillen v. Army*, 50 M.S.P.R. 293 (1991), the MSPB dismissed two charges of sexual harassment against the appellant, finding that the alleged victims lacked credibility and that the agency had failed to show by a preponderance of the evidence that the appellant was guilty of sexual harassment. (In two prior decisions, the Board had reviewed the original charges and had reduced from five to three the number of victims originally specified. See *Hillen v. Department of the Army*, 29 M.S.P.R. 690 (1986) (*Hillen I*); *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987) (*Hillen II*)). The Board, however, did find that the evidence substantiated the charges of offensive touching of a sexual nature asserted by one of the appellant's subordinates. The Board concluded that Hillen had touched the victim's buttocks in an offensive, sexual manner. This act, the Board stated, was the appellant's only substantiated act of sexual misconduct. It found that this one act did not rise to the level of sexual harassment because it was neither pervasive, nor of sufficient severity seriously to affect a reasonable employee's work or psychological well-being. Based on these findings the Board directed the agency to cancel Hillen's removal.

Examined together, these decisions raise two questions: How would Hillen's victim have fared if she had made an EEO complaint alleging that Hillen, an individual in her supervisory chain, had subjected her to sexual harassment? Will Julian's supervisor prevail if he is disciplined as a result of the EEOC decision and then appeals that discipline to the MSPB?

The apparently contradictory conclusions of the EEOC and the MSPB may be harmonized to some extent by comparing the severity of the alleged sexual harassments. In *Hillen* the Board found only one incident of offensive sexual conduct toward a subordinate. In *Julian*, however, the supervisor's offensive conduct was repeated over a ten month period. Even so, some points in the EEOC opinion seem to fly in the face of the Board's decision in *Hillen*. The Commission was adamant that Julian and her coworkers should not have to experience sexual harassment in the workplace, that Julian should not have to continue to work under the supervisor that harassed her, and that the agency should monitor that workplace for possible sexual discrimination. The Board in *Hillen* articulated none of these concerns. The diversity of these opinions appears to imply that one forum has been created to protect sexual harassers and another to protect

their victims. That might be an acceptable alternative, if the same standards were applied in both fora.

The resolution of the dilemma will have to come from the courts. Until then, labor counselors can take several steps to lessen the likelihood that their clients will end up in a *Hillen* or a *Julian* situation:

(1) A labor counselor that is advising an agency on the proposed discipline of a supervisory employee found to have committed sexual harassment based on the EEOC standard should apply the analysis in *Hillen*. He or she should consider whether the harassment was pervasive or sufficiently severe to have an adverse psychological impact on a reasonable employee. Although a single incident may be enough to form the basis for disciplinary action, it must be an incident serious enough to sustain an action under the *Hillen* test.

(2) If the labor counselor is advising an agency about a complaint by an employee that the agency has determined to be the victim of sexual harassment, he or she should fashion the remedy in light of the criteria the EEOC applied in *Julian*. Simply to offer the victim the option of moving to another job, while giving a letter of admonition or warning to his or her supervisor, will not be enough. More extensive measures well may be appropriate based on a consideration of the surrounding circumstances.

(3) In either of the above situations, labor counselors should not recommend action without considering both *Hillen* and *Julian* carefully. When deciding on a final disposition in any case, the decision should reflect consideration and application of the criteria contained in both cases.

#### Enhancement of Attorneys' Fees: No More?

In several decisions involving the award of attorneys' fees under federal fee-shifting statutes, the Supreme Court has attempted to guide lower courts in their determinations of two issues: which side in a contested case is the prevailing party, and what fees may be classified as reasonable. In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), Justice O'Connor, writing for the Court, stated that a plaintiff must receive actual relief that is more than a technical victory or a de minimus success to be considered a prevailing party. In *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 483 U.S. 711 (1987) (*Delaware II*), a four-member plurality held that a multiplier, or enhancement, to compensate for a party's risk of loss is generally impermissible. The plurality emphasized that risk enhancements should be reserved for exceptional cases. If a risk enhancement is granted, it should be limited to no more than one third of the "lodestar"—a sum calculated by multiplying the hours the attorney reasonably expended by a reasonable hourly rate. The four dissenting justices maintained that risk enhancement should not be reserved for exceptional cases. Rather, compensa-

tion for contingencies should be based on the premium for contingencies that exist in the prevailing market. Justice O'Connor, the swing voter in *Delaware II*, actually agreed with the dissenters that contingency adjustment should be based on market treatment of contingency cases as a class. She voted with the plurality to reverse, however, because she found that the district court's award was unsupported by any findings of fact that revealed the degree to which contingency cases were compensated in the relevant legal market or that showed that enhancement was necessary to attract competent counsel.

The Court of Appeals for the District of Columbia Circuit overturned an attorneys' fee award enhancement of 100% in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991). In *King*, the attorney initially requested a thirty-five percent enhancement. The district court withheld judgment on this request pending the Supreme Court's decision in *Delaware II*; however, the district court did award \$232,000 as a lodestar. After the Supreme Court announced its decision, the attorney modified his request and the district court awarded him a 100% enhancement, basing this decision in part upon Justice O'Connor's concurrence in *Delaware II*. The Court of Appeals overturned this award, noting that it found no showing of actual difficulty in obtaining representation. In trying to discern what guidance it could from *Delaware II*, the Court of Appeals could find no practical middle ground between providing enhancements routinely and not providing them at all. Accordingly, it ruled flatly that it will not permit contingency enhancements. Given the obvious interest of the plaintiffs' bar in promoting enhancements, the Supreme Court very likely will have a chance to revisit the issue.

#### **Drinking Does Not Excuse Misconduct**

In *Lavalley v. United States Postal Service*, EEOC No. 03910117 (Equal Employment Opportunity Comm'n 1991), the EEOC concurred with the MSPB's determination that the Postal Service did not subject a mailhandler to handicap discrimination when it removed him for opening and examining five pieces of mail. The employee alleged that he had consumed three to five beers during lunch before he committed the offense. The Commission, however, noted that the employee did not establish that his misconduct was caused by his alcoholism because he failed to show that he had been so inebriated that he actually did not know that he was committing the offense.

#### **MSPB Closely Scrutinizes Charge of Theft**

In *Nazelrod v. Department of Justice*, 50 M.S.P.R. 456 (1991), the agency demoted an employee for theft and for

failing to carry out a work assignment. On appeal, however, the MSPB found that the employee did not have the intent necessary to sustain a charge of theft. Instead, it held that, at most, the evidence supported a finding of misappropriation. The Board then overruled prior precedent that had held that an agency could support theft charges by showing that an employee used money inconsistent with the owner's rights. The Board further held that the agency had no authority to mitigate the penalty because it originally charged the employee specifically with theft. The MSPB concluded that the agency had failed to prove the second charge—that the employee had failed to complete a work assignment—by a preponderance of the evidence and ruled that the AJ erred in sustaining the charge.

*Nazelrod* highlights the need for labor counselors to involve themselves intimately in disciplinary actions and especially in the proposal of adverse actions. When dealing with specific-intent offenses, especially criminal offenses, labor counselors must review relevant case law to ensure that the Army can prove each element for the offense charged. Furthermore, because of the exigencies of proof, labor counselors well might be advised in these cases merely to charge the actual conduct, rather than a presumed offense—that is, for example, the *taking* of the money, rather than the *stealing* of it. Then, in the discussion of the *Douglas* factors and the Army's Table of Penalties, the proposal and decision letters should address the appropriate penalty for the conduct charged.

#### **Drug-Use Charge Requires Chain of Custody**

In *Boykin v. United States Postal Service*, 51 M.S.P.R. 56 (1991), the agency removed the appellant when his urine sample tested positive for cocaine. The appellant argued that the sample that tested positive for cocaine was not his. On appeal, the Board noted that the agency bears the burden of proving by a preponderance of the evidence the validity of the test upon which it relies to remove an employee. In the instant case, the agency failed to provide evidence showing whether the urine sample had been mailed to the laboratory or picked up by a messenger. Accordingly, the Board found that the agency had failed to establish a chain of custody and concluded that it had not demonstrated that the urine sample was the appellant's.

The cases that labor counselors present before the MSPB often are similar to cases handled by other divisions of the local staff judge advocate's office. When faced with these circumstances, a labor counselor should brainstorm the matter with other attorneys in the office. In cases like *Boykin*, trial counsel may provide the labor counselor with invaluable trial strategy.

## Criminal Law Division Note

OTJAG Criminal Law Division

### State Compensation for Victims of Crime<sup>1</sup>

Lieutenant Colonel Warren G. Foote

The protection of victims' rights is an expanding area of law at both the federal and state levels. The Victims' Rights and Restitution Act of 1990<sup>2</sup> established specific rights and services for crime victims<sup>3</sup> and directs federal departments and agencies that are engaged in the detection, investigation, and prosecution of crime—including the Department of Defense—to "make their best efforts" to ensure that the victims of violent crimes are accorded their rights as they are described in the Act.<sup>4</sup> To ensure that we actually do "make [our] best efforts," legal assistance attorneys and individuals serving as Victim/Witness Liaisons<sup>5</sup> (VWL) should not overlook state victims' compensation laws or the wide variety of services that state and local governments provide to crime victims.

Congress created the Crime Victims Fund in 1984.<sup>6</sup> This fund provides federal financial aid to state victims' compensation and victims' assistance programs and assures more effective responses to victims in the federal criminal justice system.<sup>7</sup> The Crime Victims Fund receives millions of dollars each year from federal revenue sources that include criminal fines collected from convicted federal defendants, forfeited appearance bonds and bail bonds, and various other criminal penalties.<sup>8</sup> The

Office for Victims of Crime uses these monies to supplement state and local victims' assistance and compensation programs through grant awards.<sup>9</sup>

State crime victims' compensation programs that meet certain criteria may receive a share of these federal monies. To qualify for federal funds, a state program must (1) offer compensation to victims of criminal violence and to the survivors of victims of criminal violence, including drunk driving and domestic violence; (2) promote victim cooperation with law enforcement officials; and (3) certify that any federal funds it may receive will not take the place of any state funds already available for the program.<sup>10</sup> In addition, the state program must award compensation for crimes occurring within the state to nonresident victims and to victims of crimes that are subject to federal jurisdiction on the same basis that it would to state residents.<sup>11</sup> Consequently, a soldier, a civilian employee of a military agency, or a military dependent who is the victim of a violent crime may be eligible for payments from state and local victims' compensation funds as long as the crime occurred within the territorial jurisdiction of the United States.<sup>12</sup>

<sup>1</sup>This article would not be possible without the help of Ms. Susan Shriner, Program Specialist, Office for Victims of Crime, United States Department of Justice.

<sup>2</sup>Pub. L. 101-647, tit. V, 104 Stat. 4820; see 42 U.S.C.A. §§ 10,606-10,607 (West Supp. 1991).

<sup>3</sup>42 U.S.C.A. 10,606(b) (West Supp. 1991); see also Dep't of Justice, Guidelines for Victim and Witness Assistance (1991) [hereinafter DOJ Guidelines] (providing definitive guidance on implementing the Victims' Rights and Restitution Act of 1990, as well as the Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1503, 1505, 1510, 1512-1515, 3146, 3579, 3580 (1988)). The DOJ Guidelines "apply to those components of the Department of Justice engaged in the detection, investigation or prosecution of all Federal crimes, and in the detention and incarceration of Federal defendants." DOJ Guidelines, *supra*, at 2.

<sup>4</sup>42 U.S.C.A. § 10,606(a) provides: "Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights described in subsection (b) of this section."

<sup>5</sup>See Army Reg. 27-10, Legal Services: Military Justice, ch. 18 (22 Dec. 89), [hereinafter AR 27-10]. Paragraph 18-7 of AR 27-10 describes the role of the Victim/Witness Liaison (VWL).

<sup>6</sup>See Victims of Crime Act of 1984, Pub. L. No. 98-473, § 1402, 98 Stat. 2170.

<sup>7</sup>See 42 U.S.C.A. § 10,601 (West Supp. 1991). State compensation programs are designed to provide financial assistance to victims of crime (and their survivors) for any crime that causes death, physical injury, or expenses resulting from severe mental injury. See generally Uniform Victims of Crime Act (Proposed Official Draft Oct. 18, 1991) [hereinafter Uniform Act]; Nat'l Ass'n of Crime Victims' Compensation Bds., Program Handbook (1991) [hereinafter Program Handbook].

<sup>8</sup>See Program Guidelines for the Victims' Compensation Program Under the Victims of Crime Act, 55 Fed. Reg. 3180 (1990) [hereinafter Program Guidelines]. Criminal penalties include fines adjudged by federal magistrates for crimes that occur on military installations. See 18 U.S.C.A. § 3401 (West 1985).

<sup>9</sup>See 42 U.S.C.A. 10,605(c)(2) (West Supp. 1991); see also *id.* §§ 10,602-10,603.

<sup>10</sup>42 U.S.C.A. § 10,602(b) (West Supp. 1991). The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. VII, 102 Stat. 4421, amended 42 U.S.C. § 10,602(b)(1) (1982) to require states that receive victim compensation grants to provide compensation to victims of drunk driving and domestic violence. See 42 U.S.C.A. § 10,602(b)(2) (West Supp. 1991); see also Program Guidelines, *supra* note 8, 55 Fed. Reg. at 3183; DOJ Guidelines, *supra* note 3, at appendix C.

<sup>11</sup>42 U.S.C.A. § 10,602(b)(5)-(6) (West Supp. 1991); Program Guidelines, *supra* note 8, 55 Fed. Reg. at 3183.

<sup>12</sup>See 42 U.S.C.A. § 10,602(d)(4) (West Supp. 1991); cf. *id.* § 10,602(b)(6) ("such programs [must] provide[] compensation to residents of the State who are victims of crimes occurring outside the State if ... the crimes would have been compensable ... had they occurred within the State and ... the crimes occurred in States not having eligible victim compensation programs"); Uniform Act, *supra* note 7, § 28b ("[a] victim who is a resident of this State and who is injured in a State which has no victim compensation program or in a foreign jurisdiction may file a claim in this State"). Some states award compensation to state residents no matter where the crime took place. See Information Memorandum, Office for Victims of Crime, Dep't of Justice, 9 Oct. 1991, subject: Crime Victims Fund.

The idea of victims' compensation may seem foreign to military practitioners because, unlike restitution<sup>13</sup> or claims under article 139 of the Uniform Code of Military Justice,<sup>14</sup> victims' compensation damages are not paid to the victim by the convicted defendant or liable party. Instead, each state with a compensation program has a fund from which it pays crime victims for certain out-of-pocket expenses. These state funds, which often are financed through relatively small assessments against convicted criminals, essentially create an insurance fund from which victims are paid. Federal monies from the Crime Victims Fund supplement the state programs.<sup>15</sup>

"Crime victim[s]' compensation is a direct payment to a crime victim for out-of-pocket expenses incurred as a result of a violent crime ...."<sup>16</sup> Compensable expenses include medical bills; mental health counseling; funeral expenses; lost wages; and the costs of eyeglasses, contact lenses, dental work, and prosthetic devices.<sup>17</sup> Other expenses covered in some states include crime scene cleanup, moving and relocation expenses, transportation to obtain medical care, job rehabilitation, and replacement services for child care and domestic help. If a victim may seek compensation from other sources—such as the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), military benefits, or private insurance—state compensation may be available only to the extent that a gap exists in the coverage that these sources provide.<sup>18</sup>

Although each state administers its own victims' compensation program, state programs share many common requirements. For instance, most programs require a vic-

tim promptly to report the crime to the police—typically, within three days. A victim also must file his or her claims for compensation within a specific filing period and must cooperate with law enforcement efforts.<sup>19</sup> Failure to comply with these requirements may render a claimant ineligible for compensation. Most states, however, authorize exceptions to these rules, allowing claimants to extend reporting requirement deadlines for "good" or "reasonable" causes.<sup>20</sup> Each state sets its own dollar limits on compensation, and retains final approval authority over victims' compensation claims.<sup>21</sup> Finally, most states administer their victims' compensation programs from central offices.<sup>22</sup>

Victims of federal crimes must apply to the appropriate state or local offices for compensation. The federal government normally does not pay compensation directly to crime victims.<sup>23</sup> A state that receives federal money for its victims' compensation program must compensate eligible victims of federal crimes, including victims of offenses under the Uniform Code of Military Justice.<sup>24</sup>

Victims' assistance service programs are distinct from victims' compensation programs and are managed by separate offices. Victims' service programs offer many forms of social and medical assistance, including crisis intervention services, counseling, emergency transportation to court, victim and witness assistance, short-term child care services, domestic violence shelters, temporary housing, and victim protection.<sup>25</sup> Many of these programs should be familiar to legal assistance attorneys. Although some of these services are available to soldiers and their dependents through programs administered by the

<sup>13</sup>See 18 U.S.C.A. §§ 3663-3664 (West 1985 & Supp. 1991).

<sup>14</sup>Article 139 of the Uniform Code of Military Justice provides that a commanding officer may convene a board upon receiving a complaint of willful damage or a wrongful taking of property by a member of the armed forces. Uniform Code of Military Justice, art. 139, 10 U.S.C.A. § 939 (West 1983). The assessment of damages by the board, subject to approval by the commanding officer, shall be charged against the pay of the offenders. *Id.*

<sup>15</sup>Telephone Interview with Ms. Susan Shriner, Program Specialist, Office for Victims of Crime, Department of Justice (Nov. 6, 1991) [hereinafter Telephone Interview].

<sup>16</sup>Dep't of Justice, Office for Victims of Crime, Crime Victims Fund Fact Sheet at 3 (1991) [hereinafter Crime Victims Fact Sheet].

<sup>17</sup>42 U.S.C.A. § 10,602(b)(1) (West Supp. 1991); Program Guidelines, *supra* note 8, 55 Fed. Reg. at 3183.

<sup>18</sup>Telephone Interview, *supra* note 15; see also Uniform Act, *supra* note 7, at 41-42; Crime Victims Fact Sheet, *supra* note 16, at 3.

<sup>19</sup>Crime Victims Fact Sheet, *supra* note 16, at 3. The reporting requirement is intended to encourage fresh information, which is essential to effective law enforcement.

<sup>20</sup>See Office for Victims of Crime, Dep't of Justice, Crime Victim Compensation: A Fact Sheet (1991) [hereinafter Fact Sheet]. Some states waive or extend time requirements for certain types of victims, such as children and victims of domestic violence. *Id.*

<sup>21</sup>*Id.*, see also Uniform Act, *supra* note 7, at 36-39.

<sup>22</sup>The Office for Victims of Crime has prepared a list of central agencies and offices of participating states which provide victim compensation, as well as victim assistance. This list may be obtained from the Criminal Law Division, Office of The Judge Advocate General (OTJAG), or Army Legal Assistance, OTJAG.

<sup>23</sup>Although most federal monies designated for crime victim compensation are administered by participating state agencies, the Office for Victims of Crime also has established a special Federal Crime Emergency Services Fund to provide direct emergency assistance to victims of federal crimes when other sources are not available. See Fact Sheet, *supra* note 20, at 1-2.

<sup>24</sup>See 42 U.S.C.A. §§ 10,602(b)(5), 10,604(f) (West Supp. 1991).

<sup>25</sup>Fact Sheet, *supra* note 20, at 5.

Department of Defense, many state and local programs have no counterparts on military installations. Judge advocates and VWLs must identify every available source of assistance if state, local, and military assistance programs are to work together, rather than work as separate entities.

The following hypothetical illustrates how a state compensation program can benefit soldiers: A soldier, his wife, and their three children are injured in a collision caused by a drunk driver and are taken by ambulance to a civilian hospital.<sup>26</sup> One child dies enroute. The survivors receive inpatient emergency hospital care and outpatient care for their injuries.

On behalf of the dependents, CHAMPUS will pay 100% of all allowed medical charges for inpatient care and eighty percent of allowed charges for outpatient care. Depending on the coverages of the insurance policies carried by the drunk driver and the soldier, the soldier may have to pay a significant medical bill. By filing an application for compensation, however, the soldier may be eligible for compensation for all of his out-of-pocket medical expenses and also may receive compensation for funeral expenses. Moreover, if the soldier's wife works, she may be entitled to compensation for lost wages and for the cost of any physical therapy she receives that is not covered by CHAMPUS. Finally, counseling may be available through the state office for victims' assistance. The types and amounts of compensation and assistance will vary according to the specific coverage offered by insurance, any damages obtained against the drunk driver, and the availability of on-post medical care.<sup>27</sup>

Staff judge advocates (SJAs) play important roles in the victims' assistance and compensation process. An

SJA not only must train judge advocates, law enforcement personnel, and social services providers within his or her general court-martial (GCM) jurisdiction,<sup>28</sup> but also must serve as the commander's honest broker, ensuring that the command makes its "best effort" to provide all victims of federal crimes with the assistance and protection to which they are entitled under the law.<sup>29</sup>

Staff judge advocates should ensure that victims of crimes that occur within their GCM jurisdictions are advised of their rights to apply for compensation.<sup>30</sup> This may require an SJA to coordinate with other federal agencies that investigate and prosecute violations of federal law and with state and local law enforcement officials.<sup>31</sup> If a local misunderstanding exists about the eligibility of soldiers or their dependents to receive victims' compensation, VWLs and legal assistance attorneys should contact the state office for victims' compensation. If they cannot resolve the problem at that level, they may contact the Office for Victims of Crime for assistance.<sup>32</sup>

State victims' compensation programs are available to soldiers, dependents, and federal employees who are victims of crimes of violence. Unfortunately, many eligible victims do not receive compensation or assistance because they never are advised that these benefits are available.<sup>33</sup> Military attorneys and VWLs can fill this void. Prior coordination with the appropriate state offices for victims' compensation and victims' assistance will enhance the opportunities of eligible victims to receive the help to which they are entitled. Lack of preparation and training in this area could cause eligible victims unknowingly to forfeit significant compensation.

<sup>26</sup>The collision could occur either on or off post without affecting the victims' eligibilities for compensation. See, e.g., 42 U.S.C.A. § 10,602(b)(4),(5) (West Supp. 1991).

<sup>27</sup>Most states provide compensation only to a victim who suffers a "direct" injury. See generally Program Handbook, *supra* note 7. "Secondary victim" coverage usually is limited to members of the immediate family and may require that the family member actually witness the crime. *Id.* Bodily injury is a frequent requirement. Some states define bodily injury to include emotional injury. *Id.* Most states do not, however, provide compensation for lost, stolen, or damaged property. *Id.* All states provide compensation for rape, sexual assault, and child abuse, whether or not bodily injury is suffered. *Id.*

<sup>28</sup>See AR 27-10, para. 18-5.

<sup>29</sup>See 42 U.S.C.A. 10,606 (West Supp. 1991).

<sup>30</sup>Every participating state has victim compensation application forms. Legal assistance offices and VWLs could provide a valuable service by making these forms available along with a fact sheet that explains the criteria for eligibility and the applicable time requirements for filing.

<sup>31</sup>See 42 U.S.C.A. § 10,602 (West Supp. 1991). See generally Crime Victims Fact Sheet, *supra* note 16.

<sup>32</sup>At the end of 1990, 44 states, the Virgin Islands, and the District of Columbia, were eligible to receive federal monies from the Crime Victims Fund. Five states—Mississippi, Georgia, Vermont, South Dakota, and New Hampshire—have new programs and will be eligible for federal crime victim funds in the near future. Maine is the only state without a crime victim compensation program. Refusal by any participating state to compensate federal victims of crime, to include soldiers and their dependents, would jeopardize its eligibility to receive federal grant money under the terms of the statute. See Program Guidelines, *supra* note 8, 55 Fed. Reg. at 3183; Crime Victims Fact Sheet, *supra* note 16, at 4. Additional information concerning this program may be obtained from the Office for Victims of Crime, 633 Indiana Avenue, N.W., Washington, D.C. 20531, telephone number (202) 307-5947.

<sup>33</sup>Failure to receive any of the rights set forth in the Victims' Bill of Rights does not confer standing upon a victim to enforce the rights created by statute. 42 U.S.C.A. 10,606(c) (West Supp. 1991); see also *Dix v. Humboldt County Super. Court*, 228 Cal. App. 3d 307, 267 Cal. Rptr. 88 (Cal. Ct. App. 1990).

# Professional Responsibility Notes

## OTJAG Standards of Conduct Office

### Ethical Awareness

The following case summaries, which describe the application of the Army's Rules of Professional Conduct for Lawyers<sup>1</sup> to actual professional responsibility cases, may serve not only as precedents for future cases, but also as training vehicles for Army lawyers, regardless of their levels of experience, as they ponder difficult issues of professional discretion.

To stress education and protect privacy, neither the identity of the office nor the subject involved in the case studies is published.

### Case Summaries

#### *Army Rule 1.1 (Competence);*

#### *Army Rule 3.1 (Meritorious Claims and Contentions)*

*An attorney who failed to review evidence sufficiently, failed to advise investigators of a missing element of proof, and attempted to obtain evidence in violation of a regulation committed ethical violations.*

Doctor X, a psychologist who had been dismissed from his position as a civilian Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) officer, complained in a letter to The Judge Advocate General that he had "experienced personal difficulties" with the local Criminal Investigation Command (CID) office over a five-year period because of his repeated refusals to release positive urine specimens. He asserted that an Army attorney and a CID agent once improperly requested a search warrant to obtain specimens even after he showed the attorney the governing regulation, which indicated that the specimens could not be released for military justice purposes.

Doctor X's difficulties with the CID increased after local CID agents, acting on the advice of the Army attorney, titled him in an investigation into allegations that he had provided false information on his Standard Form 171, Personal Qualification Statement, about his two mail-order postgraduate degrees.<sup>2</sup> The CID later opened another investigation on the Army attorney's

advice, this time looking into Dr. X's foreign living quarters allowance claims. This investigation ultimately constituted the basis for Dr. X's removal from government service.

Because the attorney not only failed to review the ADAPCP regulation exempting the release of certain urine specimens to criminal investigators, but also aided an investigator in making a frivolous request for a search warrant, he violated Army Rule 3.1 regarding meritorious claims and contentions.<sup>3</sup> The attorney also committed two violations of Army Rule 1.1, regarding competent representation. The attorney's failure carefully to compare Dr. X's LQA entitlements with various applications and payment documents was the first shortcoming.<sup>4</sup> The second deficiency arose when the attorney failed to advise the CID that Dr. X's public use of the two postgraduate degrees was not actionable unless Dr. X actually knew that the institution from which he graduated lacked the authority to grant degrees. The attorney's inadequate review and inaccurate advice amounted to incompetent representation.

The supervisory judge advocate concurred with the preliminary screening official's (PSO's) finding of minor, technical violations and directed the attorney's staff judge advocate (SJA) to counsel him orally.

#### *Army Rule 1.13 (Army as Client);*

#### *Army Rule 4.1 (Truthfulness in Statements to Others);*

#### *Army Rule 8.4 (Misconduct)*

*Even though he was precluded by regulation from acting as individual military counsel (IMC), a command judge advocate who obtained his commander's permission to enter into an attorney-client relationship with a soldier, erroneously—but unintentionally—referred to himself as an IMC, and made intemperate remarks in arguing the soldier's case was found not to have committed any ethical violations.*

An Army attorney, serving as the principal legal advisor of an organization, was contacted by friends within the local CID office. They told him that another

<sup>1</sup>Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter DA Pam 27-26].

<sup>2</sup>Years earlier, Dr. X had been investigated for misrepresenting his educational background, especially his two mail-order postgraduate psychology degrees from a West Coast university that had lost its state accreditation. The CID had not pursued the matter, however, because at one time the university actually had been state-accredited.

<sup>3</sup>An Army lawyer whose counsel is sought regarding improper activities, such as discovering confidential urinalysis results, can find helpful guidance in Army Rule 1.13(b), DA Pam 27-26, which states, in part:

(b) If a lawyer for the Army knows that an officer, employee, or other member associated with the Army is engaged in action, intends to act or refuses to act in a matter related to the representation that is either a violation of a legal obligation to the Army or a violation of law which reasonably might be imputed to the Army the lawyer shall proceed as is reasonably necessary in the best interest of the Army.

<sup>4</sup>The attorney incorrectly identified the LQA overpayment as \$4244.55, rather than \$8750.19, and also failed to correct the error in his review of the evidence.

CID agent, an acquaintance of the attorney, was being subjected to disciplinary action for fraternization and that he was dissatisfied with his Trial Defense Service (TDS) counsel. The attorney, who had prior service as a CID special agent, explained that he could not help without a personal request from the accused. The accused soon contacted the attorney and asked for assistance, stating that his case probably would be handled administratively and would involve no travel or court appearances. Based on this assertion, the attorney obtained his commander's permission to help the agent.

The attorney then contacted TDS. He spoke with both the appointed trial defense counsel and the regional defense counsel (RDC). The RDC, knowing of the attorney's extensive knowledge of CID policy and procedures, expected the attorney to serve as a consultant.

The attorney then personally visited the CID regional headquarters, where he met with both the CID legal advisor and the deputy commander. He also telephoned the United States Army Criminal Investigation Command (USACIDC) SJA and the USACIDC deputy staff judge advocate, who soon were upset over the assertive nature of his arguments—especially what they perceived to be threats to reveal alleged CID coverups of improper conduct. When the attorney submitted a written analysis to the USACIDC SJA in which he appeared to allege that the SJA was part of a conspiracy to persecute the accused and cover up CID mistakes, the SJA reported the apparent ethical violations to the Executive, Office of The Judge Advocate General. A PSO was appointed to inquire into the allegations of professional impropriety lodged against the attorney.

The PSO and the supervisory judge advocate found that no ethical violation occurred, even though the attorney's detailed defense submission<sup>5</sup> had impeached the integrity, intent, and duty performance of officers and lawyers assigned to CID, and had suggested that he would air CID problems outside of CID channels if his client's name were not deleted from the fraternization report. They felt that the intemperate language the attorney had used was the product of careless writing rather than intentional misconduct. In their opinions, the attorney simply became too personally involved and lost his professional objectivity.

As the principal legal advisor to a command, the attorney was precluded by regulation<sup>6</sup> from serving as an IMC. Even so, because he had received permission from his commander to provide legal assistance and he did not establish the legal assistance relationship in violation of professional standards, the investigators attributed the attorney's error in calling himself an "IMC" to simple carelessness.

After the investigators determined that no ethical violations had occurred, the Assistant Judge Advocate General for Military Law (AJAG/ML) wrote the attorney a counseling letter to express his concern that, in his zeal, the attorney had departed from his role as command legal advisor, had become too personally involved, had exhibited poor judgment, and had engaged in intemperate and inappropriate conduct. The AJAG/ML reminded the attorney of the special trust and confidence his position entailed,<sup>7</sup> counseled him to avoid situations in which his role as a lawyer and a judge advocate could be compromised or questioned, and urged him to exercise greater prudence and care in his professional communications.

<sup>5</sup>The PSO noted specifically that the written submission on behalf of the accused was an extensive document reflecting hours of research and writing time. As a legal assistance submission, it was an ambitious effort. Essentially, the paper was a spirited defense of the agent. It included a review of the historical development of the offense of fraternization—both administratively and judicially—and provided an "inside look" into life within the CID based on the attorney's personal experience as an agent. The attorney analyzed the report of investigation in excruciating detail. The paper also covered the administrative procedures that led to the downgrade of the agent's offense from indecent assault to fraternization.

<sup>6</sup>Army Reg. 27-1, Judge Advocate Legal Service, para. 2-5 (15 Sept. 1989); Army Reg. 27-10, Military Justice, para. 5-7c (22 Dec. 1989).

<sup>7</sup>The comment to Rule 8.4, DA Pam 27-26, reminds Army judge advocates of their heightened responsibilities as commissioned officers. It declares that "judge advocates hold a commission as an officer [sic] in the United States Army and assume legal responsibilities going beyond those of other citizens. A judge advocate's abuse of such commission can suggest an inability to fulfill the professional role of judge advocate and lawyer."

## Guard and Reserve Affairs Items

*Judge Advocate Guard and Reserve Affairs Department, TJAGSA*

### Quotas for JATT and JAOAC for AY 1992

Quotas for Judge Advocate Triennial Training (JATT) and the Judge Advocate Officers Advanced Course (JAOAC) are available on ATRRS (Army Training Requirements and Resource System). To qualify for JATT, you must be a United States Army Reserve judge advocate in a court-martial trial team, court martial defense team, or a military judge team. To qualify for

JAOAC, you must be a Reserve component judge advocate, currently enrolled in the advanced course, who has not completed any portion of the military justice subcourses (Phase II). Quotas are available *only* through ATRRS, the Army's automation system for the allocation of training spaces. If you are an Army Reservist in a troop unit or a National Guardsman, you should contact your training noncommissioned officer to request a quota.

If you are an individual mobilization augmentee or an individual ready reservist, you should contact ARPERCEN, JAG PMO at 1-800-325-4916 or (314) 538-3762. When you request a quota, advise your point of contact that the school code for The Judge Advocate General's School (TJAGSA) in ATRRS is 181. All quotas for courses at TJAGSA now are available only through ATRRS. Do not call TJAGSA to obtain a quota for any course, including JATT and JAOAC, because TJAGSA cannot enter you into ATRRS.

#### United States Army Reserve Tenured JAGC Positions

1. Senior Judge Advocate General's Corps (JAGC) positions in United States Army Reserve (USAR) Troop Program Units are tenured for three years. These positions include Military Law Center commanders and senior staff judge advocates in Army Reserve Commands (ARCOM), Army Reserve General Officer Commands (GOCOM), and other major commands. The Judge Advocate General has delegated assignment authority for these positions to The Assistant Judge Advocate General.

To fill these positions, a unit must act at least nine months before the end of the tenure of its current incumbent. The unit's first step should be to advertise the impending vacancy in unit bulletins or command newspapers and to ensure that qualified Individual Ready Reserve members in the area know that they may apply for the position. The unit also may obtain a list of eligible officers by initiating a Request for Unit Vacancy Fill, Dep't of Army Form 4935-R (DA Form 4935-R). The DA Form 4935-R can be sent to the Major United States Army Reserve Command (MUSARC), adjacent MUSARCs, and the Army Reserve Personnel Center (ATTN: DARP-MOB-C). The CONUSA Staff Judge Advocate (SJA) also can provide a list of eligible judge advocates to ARCOM and GOCOM SJAs. The unit should nominate at least three candidates. The nomination packets should contain a list of all officers considered and a description of the efforts the unit has made to publicize the vacancy. The following information must be submitted for each officer nominated:

a. Personal data: full name (including the candidate's preferred name if other than first name), grade, date of rank, mandatory release date, age, address, telephone number (business and home), business fax number, full-length official photograph.

b. Military experience: chronological list of Reserve and active duty assignments and copies of the candidate's officer evaluation reports for the past five years—including the senior rater profile, if possible.

c. Awards and decorations: copies of all awards and decorations and significant letters of commendation the candidate has received.

d. Military and civilian education: list the schools the candidate has attended, the degrees he or she has obtained, dates of completion, and any honors awarded.

Units must forward nominations for MLC commanders and for SJAs of ARCOMs, GOCOMs, and other major commands through the chain of command to arrive at TJAGSA (ATTN: JAGS-GRA, Charlottesville, VA 22903-1781) at least six months before the tenure expires. Tenure for these positions is three years and officers selected will be expected to serve the full three years. An officer in the appropriate grade for the assignment will have priority for selection. For instance, a lieutenant colonel usually will not be selected for a position authorized a colonel if a qualified colonel is available. Officers usually will have only one tour in the same tenured position. Qualifying experience for these positions will be evaluated in relation to the Conceptual Model for JAGC-USAR professional development and assignment patterns for the 1990's. See Guard and Reserve Affairs Item, *JAGC-USAR Professional Development and Assignment Patterns For The 1990's*, The Army Lawyer, June 1990, at 82.

2. Military Judge Positions also are tenured. Nominations for military judges will be forwarded through the channels listed above to the Chief Trial Judge, ATTN: JALSTJ, 5611 Columbia Pike, Falls Church, VA 22041-5013.

3. Nominations for Judge Advocate General Service Organization team directors and JAGC section leaders will be forwarded by the unit commander through the CONUSA SJA, the United States Army Reserve Command SJA, and the Forces Command SJA, to the Director, Guard and Reserve Affairs Department, TJAGSA, at least six months prior to the expiration of the incumbent's tenure. The Director of Guard and Reserve Affairs has been delegated the authority to select judge advocates for these positions.

Dr. Mark Foley is the POC at Guard and Reserve Affairs Department for all tenured position issues (804-972-6382).

#### SENIOR RESERVE JUDGE ADVOCATE POSITIONS

##### U.S. ARMY RESERVE COMMANDS

##### First Army

##### ARCOM

77 Fort Totten, NY  
79 Willow Grove, PA  
83 Columbus, OH  
86 Forest Park, IL

##### SJA

COL R.A. Salvatore  
COL W.S. Little  
LTC T.A. Ciccolini  
COL M.R. Kos

##### Vacancy Due

1 Jul 92  
15 Jan 93  
1 Dec 94  
1 Apr 92

ARCOM

88 Fort Snelling, MN  
 94 Hanscom AFB, PA  
 97 Fort Meade, MD  
 99 Oakdale, PA  
 123 Indianapolis, IN

## Second Army

ARCOM

81 East Point, GA  
 120 Fort Jackson, SC  
 121 Birmingham, AL  
 125 Nashville, TN

## Fifth Army

ARCOM

89 Wichita, KS  
 90 San Antonio, TX  
 102 St. Louis, MO  
 122 Little Rock, AR

## Sixth Army

ARCOM

63 Los Angeles, CA  
 96 Fort Douglas, UT  
 124 Fort Lawton, WA

SJA

COL M.F. Hanson  
 COL G.D. D'Avolio  
 COL J.F. DePue  
 COL W.J. Ivill  
 COL J.M. Wouczyna

Vacancy Due

15 Jul 94  
 15 Jun 92  
 1 Sep 94  
 1 Apr 93  
 1 Dec 94

SJA

COL O.D. Peters  
 COL H.B. Campbell  
 COL M.D. Barber  
 COL R.E. Harrison

Vacancy Due

1 Nov 94  
 20 Jun 92  
 1 Jun 94  
 15 Aug 94

SJA

COL W. Dillon  
 COL J.D. Farris  
 COL D.E. Johnson  
 COL J.S. Arthurs

Vacancy Due

15 Dec 94  
 1 Apr 93  
 30 Jun 93  
 1 May 92

SJA

COL J.C. Spence, III  
 COL M.J. Pezely  
 COL S.R. Black

Vacancy Due

10 Jul 93  
 1 Sep 92  
 30 Jun 93

MILITARY LAW CENTERS

## First Army

MLC

3 Boston, MA  
 4 Bronx, NY  
 7 Chicago, IL  
 9 Columbus, OH  
 10 Washington, DC  
 42 Pittsburgh, PA  
 153 Willow Grove, PA  
 214 Fort Snelling, MN

Commander

COL P.L. Cummings  
 COL J.P. Cullen  
 COL S.J. Connolly  
 COL M.C. Matuska  
 COL B. Miller  
 COL A.B. Bowden  
 COL D.E. Prewitt  
 COL R.M. Frazee

Vacancy Due

15 Nov 92  
 1 Sep 92  
 2 Feb 94  
 1 May 92  
 1 Sep 94  
 1 Sep 92  
 1 Nov 92  
 1 Mar 94

## Second Army

MLC

11 Jackson, MS  
 12 Columbia, SC  
 139 Louisville, KY  
 174 Miami, FL  
 213 Chamblee, GA

Commander

COL W.M. Bost  
 COL C.M. Pleicones  
 COL M.K. Gordon  
 COL J.W. Hart  
 COL R.A. Bartlett

Vacancy Due

1 Nov 94  
 15 Sep 93  
 15 Jun 94  
 1 Jul 92  
 15 Sep 93

## Fifth Army

MLC

1 San Antonio, TX  
 2 New Orleans, LA  
 8 Independence, MO  
 113 Wichita, KS  
 114 Dallas, TX

Commander

COL G.M. Brown  
 COL M.J. Thibodeaux  
 COL T.S. Reavely  
 COL W. Dillon, Jr.  
 COL G.M. Cook

Vacancy Due

31 May 92  
 1 Jul 92  
 30 Jan 94  
 28 Feb 92  
 15 Sep 91

# Sixth Army

## MLC

5 Presidio of SF, CA  
6 Seattle, WA  
78 Los Alamitos, CA  
87 Fort Douglas, UT

## Commander

COL J.A. Lassart  
COL B.G. Porter  
COL J.D. Kirby  
COL R.H. Nixon

## Vacancy Due

3 Apr 92  
28 Aug 92  
1 Jul 93  
1 Sep 92

## TRAINING DIVISIONS

### First Army

#### TNG DIV

70 Livonia, MI  
76 West Hartford, CT  
78 Edison, NJ  
80 Richmond, VA  
84 Milwaukee, WI  
85 Chicago, IL  
98 Rochester, NY

#### SJA

LTC J.P. Warren  
LTC H.R. Cummings  
MAJ K.J. Hanko  
LTC R.V. Anderson  
LTC T.G. Van de Grift  
LTC T.J. Benshoof  
LTC M.P. LaHaye

#### Vacancy Due

3 Oct 94  
15 Sep 90  
15 Jan 93  
1 Sep 94  
1 Nov 92  
31 Aug 91  
15 Aug 94

### Second Army

#### TNG DIV

100 Louisville, KY  
108 Charlotte, NC

#### SJA

MAJ S.B. Pence

#### Vacancy Due

1 Nov 94

### Fifth Army

#### TNG DIV

95 Oklahoma City, OK

#### SJA

COL G.A. Glass

#### Vacancy Due

1 Oct 92

### Sixth Army

#### TNG DIV

91 Sausalito, CA  
104 Vancouver Barracks, WA

#### SJA

LTC J.M. Reidenbach  
LTC B.C. Shedahl

#### Vacancy Due

1 Nov 92  
1 Apr 93

## GENERAL OFFICER COMMANDS

### First Army

#### GOCOMs

6 INF DIV Fort Snelling, MN  
8 MED BDE Brooklyn, NY  
21 SPT CMD Indianapolis, IN  
30 HOSP CTR Fort Sheridan, IL  
103 COSCOM Des Moines, IA  
157 INF BDE (SEP) Horsham, PA  
220 MP BDE Gaithersburg, MD  
300 SPT GP (AREA) Fort Lee, VA  
300 MP CMD Inkster, MI  
310 TAACOM Fort Belvoir, VA  
352 CA CMD Riverdale, MD  
353 CA CMD Bronx, NY  
411 ENGR BDE Brooklyn, NY  
416 ENGR CMD (TDA AUG) Chicago, IL  
416 ENGR CMD Chicago, IL  
425 TRANS BDE Fort Sheridan, IL  
800 MP BDE Hempstead, NY  
804 HOSP CTR Bedford, MA

#### SJA

MAJ D.T. Peterson  
LTC J.E. Brown  
LTC C.H. Criss  
LTC R.R. Steele  
COL R.M. Kayser  
LTC E.D. Barry  
MAJ M.G. Gallagher  
LTC M.R. Smythers  
COL P.A. Kirchner  
COL F.X. Gindhart  
COL R.E. Geyer  
COL C.T. Grasso  
LTC W.C. Jaekel  
COL T.A. Morris  
COL J.R. Osgood  
LTC T.J. Hyland  
MAJ A.P. Moncayo  
MAJ G.T. O'Brien

#### Vacancy Due

1 Oct 94  
1 Nov 92  
1 Apr 91  
22 Nov 91  
15 May 94  
1 Jul 92  
1 Feb 94  
1 Nov 92  
15 Aug 92  
1 Oct 94  
Jul 91  
1 Dec 92  
15 Apr 92  
1 Dec 92  
1 Jun 93  
1 Jun 92  
Apr 90  
1 Aug 92

## Second Army

### GOCOMs

3 TRANS BDE Anniston, AL  
87 MAN AREA CMD Birmingham, AL  
143 TRANS CMD Orlando, FL  
332 MED BDE Nashville, TN  
335 SIG CMD East Point, GA  
412 ENGR BDE Vicksburg, MS  
415 CHEM BDE Greenville, SC  
818 HOSP CTR Forest Park, GA  
USAR Forces San Juan, PR

### SJA

LTC W.C. Tucker, Jr.  
LTC E.E. Stoker  
COL F.J. Pyle, Jr.  
MAJ B. Story  
COL K.A. Griffiths  
COL D.M. Magee  
LTC D.K. Warner  
MAJ K.S. Byers  
LTC C. Fitzwilliams

### Vacancy Due

1 Mar 93  
2 Jul 94  
1 Apr 93  
31 Aug 93  
1 Nov 94  
1 Oct 94  
15 Feb 92  
1 Jun 94

## Fifth Army

### GOCOMs

75 MAN AREA CMD Houston, TX  
156 SPT GP Albuquerque, NM  
321 CA GP San Antonio, TX  
326 SPT GP Kansas City, KS  
377 TAACOM New Orleans, LA  
420 ENGR BDE Bryan, TX  
807 MED BDE Seagoville, TX

### SJA

COL W.H. Sullivan  
LTC R.G. Walker  
LTC R.M. Kuntz  
LTC M. Walker  
LTC R. Goddard  
LTC J.W. Hely, Jr.  
LTC A.C. Olivo

### Vacancy Due

1 Aug 92  
1 Apr 93  
1 Jul 92  
14 Sep 93  
27 Sep 94  
30 Nov 93  
1 Sep 92

## Sixth Army

### GOCOMs

2 HOSP CTR Novato, CA  
221 MP BDE San Jose, CA  
311 COSCOM Los Angeles, CA  
319 TRANS BDE Oakland, CA  
351 CA CMD Mountain View, CA

### SJA

MAJ L.P. Warchot  
LTC J.H. Hancock  
LTC G.J. Gliaudys  
LTC W.E. Saul  
LTC S.R. Hooper

### Vacancy Due

1 Sep 93  
2 Apr 89  
15 May 92  
15 Jul 93  
15 Aug 93

## SPECIAL OPERATIONS COMMAND

### GOCOMs

Reserve Special Operations Command (ABN),  
Fort Bragg, NC

### SJA

LTC L.N. Ellis

### Vacancy Due

1 Feb 95

## CLE News

### 1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. If you have not received a welcome letter or packet, you do not have a quota. Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7115, extension 307; commercial phone: (804) 972-6307).

### 2. TJAGSA CLE Course Schedule

#### 1992

6-10 April: 111th Senior Officers Legal Orientation (5F-F1).

13-17 April: 12th Operational Law Seminar (5F-F47).

13-17 April: 3d Law for Legal NCO's Course (512-71D/E/20/30).

21-24 April: Reserve Component Judge Advocate Workshop (5F-F56).

27 April-8 May: 127th Contract Attorneys Course (5F-F10).

18-22 May: 34th Fiscal Law Course (5F-F12).

18-22 May: 41st Federal Labor Relations Course (5F-F22).

18 May-5 June: 35th Military Judge Course (5F-F33).

1-5 June: 112th Senior Officers Legal Orientation (5F-F1).

8-10 June: 8th SJA Spouses' Course (5F-F60).

8-12 June: 22d Staff Judge Advocate Course (5F-F52).

15-26 June: JATT Team Training (5F-F57).

15-26 June: JAOAC (Phase II) (5F-F55).

6-10 July: 3d Legal Administrator's Course (7A-550A1).

8-10 July: 23d Methods of Instruction Course (5F-F70).

13-17 July: U.S. Army Claims Service Training Seminar.

13-17 July: 4th STARC JA Mobilization and Training Workshop.

15-17 July: Professional Recruiting Training Seminar.

20 July-25 September: 128th Basic Course (5-27-C20).

20-31 July: 128th Contract Attorneys Course (5F-F10).

3 August-14 May 93: 41st Graduate Course (5-27-C22).

3-7 August: 51st Law of War Workshop (5F-F42).

10-14 August: 16th Criminal Law New Developments Course (5F-F35).

17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).

24-28 August: 113th Senior Officers Legal Orientation (5F-F1).

31 August-4 September: 13th Operational Law Seminar (5F-F47).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

### 3. Civilian Sponsored CLE Courses

#### June 1992

1-2: ESI, Changes, Denver, CO.

2-5: ESI, Competitive Proposals Contracting, Denver, CO.

2-5: ESI, Contracting for Services, Washington, DC

3: ESI, Protests, Denver, CO.

4-5: ESI, Claims and Disputes, Denver, CO.

8-9: ESI, Terminations, Denver, CO.

8-10: ESI, International Contracting, Washington, DC

8-12: ESI, The Winning Proposal, Denver, CO.

9-12: ESI, Federal Supply Schedules, Washington, DC

13-19: AAJE, Judicial Problem Solving Techniques, Orlando, FL.

13-19: AAJE, Probate Judges: Philosophical Ethics and Decision Making, Orlando, FL.

15-16: GWU, ADP/Telecommunications Contract Law, Washington, DC

15-19: GWU, Cost-Reimbursement Contracting, Seattle, WA.

15-19: GWU, Government Contract Law, San Diego, CA.

15-19: ESI, Operating Practices in Contract Administration, Washington, DC

16-19: ESI, Negotiation Strategies and Techniques, Washington, DC

16-19: ESI, Subcontracting, San Diego, CA.

16-19: ESI, Contract Accounting and Financial Management, San Francisco, CA.

22-24: GWU, Source Selection Workshop, Seattle, WA.

22-26: ESI, Managing Projects in Organizations, Washington, DC

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1992 issue of *The Army Lawyer*.

### 4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
**Alabama	31 January annually
Arizona	15 July annually
Arkansas	30 June annually
*California	36 hours over 3 years
Colorado	Anytime within three-year period
Delaware	31 July biennially
*Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	June 30 annually
**Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August every third year

**Mississippi	31 December annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
**North Carolina	28 February of succeeding year
North Dakota	31 July annually
*Ohio	Every two years by 31 January
**Oklahoma	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter every three years
**South Carolina	15 January annually
*Tennessee	1 March annually

Texas	Last day of birth month annually
Utah	31 December of 2d year of admission
Vermont	15 July every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June every other year
*Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the January 1992 issue of *The Army Lawyer*.

\*Military exempt

\*\*Military must declare exemption

## Current Material of Interest

### 1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users,

nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

#### Contract Law

- AD A239203 Government Contract Law Deskbook Vol. 1/JA-505-1-91 (332 pgs).
- AD A239204 Government Contract Law Deskbook, Vol. 2/JA-505-2-91 (276 pgs).
- AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

#### Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
- AD B135492 Legal Assistance Consumer Law Guide/JAGS-ADA-89-3 (609 pgs).
- AD B147390 Legal Assistance Guide: Real Property/JA-261-90 (294 pgs).
- AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).
- AD B147389 Legal Assistance Guide: Notarial/JA-268-90 (134 pgs).
- AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).
- AD A230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).

- \*AD A244874 Legal Assistance Wills Guide/JA-262-91 (474 pgs).
- AD A241652 Office Administration Guide/JA 271-91 (222 pgs).
- AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).
- AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).
- \*AD A244032 Family Law Guide/JA 263-91 (711 pgs).

#### Administrative and Civil Law

- AD A239554 Government Information Practices/JA-235(91) (324 pgs).
- AD A240047 Defensive Federal Litigation/JA-200(91) (838 pgs).
- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- AD A236663 Reports of Survey and Line of Duty Determinations/JA 231-91 (91 pgs).
- AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

#### Labor Law

- AD A239202 Law of Federal Employment/JA-210-91 (484 pgs).
- AD A236851 The Law of Federal Labor-Management Relations/JA-211-91 (487 pgs).

#### Developments, Doctrine & Literature

- AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

#### Criminal Law

- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
- AD B135506 Criminal Law Deskbook Crimes and Defenses/JAGS-ADC-89-1 (205 pgs).
- AD B137070 Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).
- AD B140529 Criminal Law, Nonjudicial Punishment/JAGS-ADC-89-4 (43 pgs).
- AD A236860 Senior Officers' Legal Orientation/JA 320-91 (254 pgs).
- AD B140543L Trial Counsel and Defense Counsel Handbook/JA 310-91 (448 pgs).
- AD A233621 United States Attorney Prosecutors/JA-338-91 (331 pgs).

#### Reserve Affairs

- AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

\*Indicates new publication or revised edition.

## 2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander  
U.S. Army Publications Distribution Center  
2800 Eastern Blvd.  
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(1) *Active Army.*

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

<u>Number</u>	<u>Title</u>	<u>Date</u>
AR 36-5	Auditing Service in the Department of the Army	16 Dec 91
AR 600-9	Army Weight Control Program, Interim Change I01	15 Nov 91
AR 640-3	Identification Cards, Tags, and Badges, Interim Change I01	18 Nov 91
AR 700-143	Performance Oriented Packaging of Hazardous Material	26 Sep 91
CIR 25-91-3	Secretary of the Army Awards for Improving Publications	1 Oct 91
CIR 611-91-2	Implementation of Changes to the Military Occupational Classification and Structure	19 Oct 91
JFTR	Joint Federal Travel Regulations, Volume 1, Change 61	1 Jan 92
PAM 351-4	Army Formal Schools Catalog	27 Sep 91

### 3. OTJAG Bulletin Board System.

a. Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the OTJAG BBS. Following are instructions for downloading publications and a list of TJAGSA publications that currently are available on the OTJAG BBS. The TJAGSA Literature and Publications Office welcomes suggestions that would make accessing, downloading, printing, and distributing OTJAG BBS publications easier and more efficient. Please send suggestions to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

b. *Instructions for Downloading Files From the OTJAG Bulletin Board System.*

(1) Log-on to the OTJAG BBS using ENABLE and the communications parameters listed in subparagraph a above.

(2) If you never have downloaded files before, you will need the file decompression program that the OTJAG BBS uses to facilitate rapid transfer of files over the phone lines. This program is known as the PKZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu then will ask for a file name. Enter [c:\pkz110.exe].

(h) The OTJAG BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off of the OTJAG BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C> prompt. The PKZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKZIP utility program.

(3) To download a file, after logging on to the OTJAG BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the OTJAG BBS responds with the time and size data, type F10. From the top-line menu, select

[f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a filename, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete, and the file you downloaded will have been saved on your hard drive.

(g) After file transfer is complete, log-off of the OTJAG BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not a compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C> prompt, enter [pkunzip[space]xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the OTJAG BBS). The PKZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "xxxxx.DOC" by following the instructions in paragraph 4(a) above.

c. *TJAGSA Publications available through the OTJAG BBS.* Below is a list of publications available through the OTJAG BBS. The file names and descriptions appearing in bold print denote new or updated publications. All active Army JAG offices, and all Reserve and National Guard organizations having computer telecommunications capabilities, should download desired publications from the OTJAG BBS using the instructions in paragraphs a and b above. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having a bona fide military need for these publications, may request computer diskettes containing the publications listed below from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

Filename	Title
121CAC.ZIP	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course

1990YIR.ZIP	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA	JA267.ZIP	Army Legal Assistance Information Directory
505-1.ZIP	TJAGSA Contract Law Deskbook, Vol. 1, February 1992	JA268.ZIP	Legal Assistance Notorial Guide
505-1.ZIP	TJAGSA Contract Law Deskbook, Vol. 1, May 1991	JA269.ZIP	Federal Tax Information Series
505-2.ZIP	TJAGSA Contract Law Deskbook, Vol. 2, February 1992	JA271.ZIP	Legal Assistance Office Administration
505-2.ZIP	TJAGSA Contract Law Deskbook, Vol. 2, May 1991	JA272.ZIP	Legal Assistance Deployment Guide
506.ZIP	TJAGSA Fiscal Law Deskbook, November 1991	JA281.ZIP	AR 15-6 Investigations
506.ZIP	TJAGSA Fiscal Law Deskbook, May 1991	JA285A.ZIP	Senior Officer's Legal Orientation 1
ALAW.ZIP	Army Lawyer and Military Law Review Database in ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF	JA285B.ZIP	Senior Officer's Legal Orientation 2
CCLR.ZIP	Contract Claims, Litigation, & Remedies	JA290.ZIP	SJA Office Manager's Handbook
FISCALBK.ZIP	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA	JA296A.ZIP	Administrative & Civil Law Handbook 1
FISCALBK.ZIP	May 1990 Fiscal Law Course Deskbook in ASCII format	JA296B.ZIP	Administrative & Civil Law Handbook 2
JA200A.ZIP	Defensive Federal Litigation 1	JA296C.ZIP	Administrative & Civil Law Handbook 3
JA200B.ZIP	Defensive Federal Litigation 2	JA296D.ZIP	Administrative & Civil Law Deskbook 4
JA210A.ZIP	Law of Federal Employment 1	JA296F.ARC	Administrative & Civil Law Deskbook 6
JA210B.ZIP	Law of Federal Employment 2	JA301.ZIP	Unauthorized Absence—Programed Instruction, TJAGSA Criminal Law Division
JA231.ZIP	Reports of Survey & Line of Duty Determinations Programmed Instruction.	JA310.ZIP	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA235.ZIP	Government Information Practices	JA320.ZIP	Senior Officers' Legal Orientation Criminal Law Text
JA240PT1.ZIP	Claims—Programmed Text 1	JA330.ZIP	Nonjudicial Punishment—Programmed Instruction, TJAGSA Criminal Law Division
JA240PT2.ZIP	Claims—Programmed Text 2	JA337.ZIP	Crimes and Defenses Deskbook (DOWNLOAD ON HARD DRIVE ONLY.)
JA241.ZIP	Federal Tort Claims Act	V1YIR91.ZIP	Contract Law Year in Review for CY 1991, Volume 1
JA260.ZIP	Soldiers' & Sailors' Civil Relief Act	V2YIR91.ZIP	Contract Law Year in Review for CY 1991, Volume 2
JA261.ZIP	Legal Assistance Real Property Guide	V3YIR91.ZIP	Contract Law Year in Review for CY 1991, Volume 3
JA262.ZIP	Legal Assistance Wills Guide	YIR89.ZIP	Contract Law Year in Review—1989
JA263A.ZIP	Legal Assistance Family Law 1	<b>4. TJAGSA Information Management Items.</b>	
JA265A.ZIP	Legal Assistance Consumer Law Guide 1	a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:	
JA265B.ZIP	Legal Assistance Consumer Law Guide 2	"postmaster@jags2.jag.virginia.edu"	
JA265C.ZIP	Legal Assistance Consumer Law Guide 3	The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or	
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement		

PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crank(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

## 5. The Army Law Library System.

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.



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Department of the Army  
The Judge Advocate General's School  
US Army  
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Charlottesville, VA 22903-1781

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